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## ENVIRONMENTAL ASSESSMENT BOARD



# ONTARIO HYDRO DEMAND/SUPPLY PLAN HEARINGS

VOLUME:

120

DATE: Tuesday, March 10, 1992

BEFORE:

HON. MR. JUSTICE E. SAUNDERS

Chairman

DR. G. CONNELL

Member

MS. G. PATTERSON

Member



1416 482-3277

2300 Yonge St., Suite 709 Toronto, Canada M4P 1E4



## ENVIRONMENTAL ASSESSMENT BOARD ONTARIO HYDRO DEMAND/SUPPLY PLAN HEARING

IN THE MATTER OF the Environmental Assessment Act, R.S.O. 1980, c. 140, as amended, and Regulations thereunder:

AND IN THE MATTER OF an undertaking by Ontario Hydro consisting of a program in respect of activities-associated with meeting future electricity requirements in Ontario.

Held on the 5th Floor, 2200 Yonge Street, Toronto, Ontario, on Tuesday, the 10th day of March, 1992, commencing at 10:00 a.m.

VOLUME 120

#### BEFORE:

THE HON. MR. JUSTICE E. SAUNDERS

Chairman

DR. G. CONNELL

Member

MS. G. PATTERSON

Member

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1	Upon commencing at 10:04 a.m.
2	THE REGISTRAR: Please come to order.
3	The hearing is now in session. Please be seated.
4	THE CHAIRMAN: Mr. Mark?
5	MR. MARK: Thank you, Mr. Chairman. Good
6	morning.
7	SUBMISSIONS BY MR. MARK (Cont'd):
8	Mr. Chairman, at the end of the day
9	yesterday I was concluding my remarks on the subject of
10	what is the definition of the undertaking, and
11	particularly I was directing you to various provisions
12	in the documents which showed at least what Ontario
13	Hydro's definition of the undertaking was, and as I
14	take it from other speakers, and I certainly concur, it
15	is within the purview of Ontario Hydro to define the
16	undertaking.
17	The last subject of my comments yesterday
18	was on the question of the strategy component of the
19	undertaking definition, and if I could just in that
20	regard, Mr. Chairman, lastly and closing on that issue,
21	just refer you, in the Executive Summary, to page Roman
22	numeral 11 of Exhibit 3, under No. 13, where Ontario
23	Hydro states:
24	The demand/supply planning strategy
25	contains a set of principles, guidelines

1	and priorities for use in the development
2	of Ontario Hydro's demand/supply plans.
3	This plan is based upon that strategy.
4	So in my submission, Mr. Chairman, having
5	regard to all the passages I have referred you to, and
6	having regard to some common sense as well, the
7	undertaking includes within it that strategy. Ontario
8	Hydro has not said anywhere in its documents, here is a
9	range of strategies we can considered and they kick up
10	various different proposals.
11	They have spent five years consulting
12	with the public and the Legislature, came up with the
13	DSPS and from there they developed the candidate plans.
14	It's essential, Mr. Chairman, to
15	understand in my submission that that is the immutable
16	foundation upon which all of the identified
17	alternatives put forward by Ontario Hydro were
18	initially based.
19	So, in my submission, Mr. Chairman, both
20	the facilities content and the underlying strategy are
21	part and parcel of the undertaking as defined by Hydro.
22	So now we have to ask the question: What
23	has changed? Because, in my submission, I say in each
24	regard they have changed.
25	With regard to the specific facilities

1	content, the approvals, I don't think, Mr. Chairman,
2	there can be much doubt that it has changed. One may
3	perhaps argue whether one is a sub set of the other,
4	but on the face in terms of the facilities that Ontario
5	Hydro is seeking approval for, there is a market
6	change. That is a simple fact that cannot be resisted.
7	Now, Ontario Hydro, and some of the other
8	intervenors say, maybe there is but it doesn't matter
9	because all we are requesting now is a sub set. We
10	have scaled back, we have said on the time line we
11	don't need some, so in substance or at least in the
12	context we are concerned with here nothing has changed.
13	I would say that's an incorrect view, Mr.
14	Chairman, for two reasons. No. 1, what everybody seems
15	to be forgetting, and I don't quite understand why, is
16	the fossil life extension. In the original DSP, in the
17	original undertaking, there was no fossil life
18	extension proposed.
19	It is not one of the options which was
20	subject to any analysis, environmental analysis by
21	Ontario Hydro. It's not proposed in any of the
22	candidate plans.
23	You have heard the evidence of Panel 2,
24	you heard it rehashed in some of the cross-examinations
25	which took place most recently, and it simply wasn't on

1	the table.
2	In chapter 10 of the Demand/Supply Plan,
3	where Ontario Hydro discusses rehabilitation sorry,
4	Mr. Chairman, if you will give me a moment. That is
5	not the correct chapter. I have the reference.
6	Yes, I am sorry, it is chapter 10, page
7	10-12, Ontario Hydro puts in chart form for us the
8	rehabilitation plan. If you look at the first page of
9	figure 10-9, at the bottom we have the rehabilitation
10	plans for the fossil stations. And we have for all of
11	them, simply work to ensure the 40-year life of the
12	stations. That's it.
13	There was nothing in the original
14	Demand/Supply Plan or any of the candidate plans that
15	contemplated life extension of those stations. It is
16	important to appreciate the magnitude.
17	Ontario Hydro expects to get to 2014 an
18	additional 4,300 megawatts of supply. That is to be
19	contrasted with the approvals they are now requesting
20	of approximately 2,500 megawatts of all other
21	facilities combined.
22	I think from that description, Mr.
23	Chairman, my respectful submission, it's apparent that
24	there is now a new major component of the supply plan

which was simply not on the menu before.

25

1	The fact that Ontario Hydro says rightly
2	or wrongly, and I don't concede the point, the fact
3	that Ontario Hydro says that they do not need this
4	Board's approval technically to proceed with the life
5,	extension program, does not mean it is not a component
6	of the plan for the purposes of defining the
7	undertaking.
8	THE CHAIRMAN: But it always was a
9	component.
0	MR. MARK: It wasn't, Mr. Chairman, with
1	respect.
2	THE CHAIRMAN: Let me make sure. I have
.3	to be careful what I say.
4	MR. MARK: Those dates are the original
5	40-year lives.
6	THE CHAIRMAN: Well, is not
.7	rehabilitation a component?
.8	MR. MARK: Rehabilitation in terms of
.9	maintaining their productive capacity to the end of the
0	originally scheduled life.
!1	THE CHAIRMAN: But your submission then
2	is that in the context of this legislation that we are
!3	hearing, that if Hydro decides that it should be
!4	extending the 40-year life to beyond the 40-year
25	period, that it can't do that.

1	MR. MARK: No. I don't want to address
2	the issue of whether Hydro does or does not need this
3	Board's approval to undertake the multi-billion dollar
4	life extension program. That's another issue. And
5	Hydro takes the same position with demand management
6	and NUGs, they say they don't need your approval to do
7	that but that doesn't change
8	THE CHAIRMAN: I am not sure why that's
9	so, but that's what they say.
10.	MR. MARK: Neither am I, and as I said,
11	Mr. Chairman, I don't want to address that today, it's
12	an issue for another day.
13	But surely as much as NUGs and DSM are
14	components of the plan, they are items on the menu
15	which Ontario Hydro says, look, here is the menu we
16	proposed and now we are taking a sub set. I say to
17	you, Mr. Chairman, the largest component of the plan in
18	the Update, the fossil life extension wasn't on the
19	menu.
20	Whether they do or don't need your
21	approval is irrelevant to an assessment as to whether
22	the components of the supply plan have changed. There
23	is not a whit of documentation because they rejected
24	it.
25	You heard Mr. Taborek in Panel 2, they

1	simply rejected it ab inititio as one of the menu
2	items. And now it is twice as much supply as anything
3	else in the plan. You heard the cross-examination
4	on
5	THE CHAIRMAN: As a matter of fact, they
6	finally took the position that you just disregard, I
7	think that was their own language, disregard what Mr.
8	Taborek and others said in Panel 2
9	MR. MARK: Quite so.
.0	THE CHAIRMAN:about extensions.
11	That's what they said.
.2	MR. MARK: That's right. Which
13	reinforces the point, Mr. Chairman, in the original
4	DSP, in the original undertaking, it wasn't on the
15	menu. It now is.
16	The second point about the physical
17	content of the plan
18	THE CHAIRMAN: I want to make sure what
L9	that means in your submission. That means that in
20	order to keep this process alive they must not make
21	those kind of policy changes; is that what you are
22	saying?
23	MR. MARK: No. My submission, Mr.
24	Chairman, and this is on the question of has the
25	undertaking changed. Ontario Hydro is no longer asking

1	for Plan 15, they have taken that off the table as
2	their request.
3	So your job, in my respectful submission,
4	in considering my motion and some of the other
5	submissions you have heard, is, is the same undertaking
6	on the table which enables this Board to proceed?
7	One of the tests which has been put
8	forward to you is, are the menu components the same?
9	Is the DSP Update menu but a sub set of what was
10	initially on the table, which is in some context a
11	useful way of answering the question I pose. And I say
12	to you, sir, simply contrary to the some of the other
13	submissions made, it's not manifestly not a sub set.
14	[10:15 a.m.]
15	There is 4,300 megawatts of supply which
16	is not one of the menu items which was even in the
17	ballpark. It wasn't between those white lines. Mr.
18	Taborek was clear. Hydro may want it in now, but
19	that's a different question. The question is: Is the
20	undertaking today different?
21	The second point on this issue, Mr.
22	Chairman, is this 25-year plan question. I suggest to
23	you, Mr. Chairman, that if it is no longer a 25-year
24	plan, there can be no doubt that it is an undertaking
25	of a different nature. In my respectful submission, it

- clearly is not a 25-year plan anymore.
- 2 Ontario Hydro in its original DSP,
- 3 regardless of where the approval time line was,
- 4 proposed a clear, comprehensive technology-specific
- 5 plan for meeting the needs up to the year 2014. The
- 6 action plan was a subset of a defined long-term plan.
- 7 In the Update that is no longer the case.
- 8 Ontario Hydro does not say to you, here is our
- 9 preferred plan for meeting load up to year 2014. It
- 10 doesn't say that. It says expressly in the Update, we
- 11 are not concerned at this point with what life will
- look like after the year 2001. It says, in fact, we
- want to throw that open again. We want to look at new
- 14 CANDU technologies, new alternate fossil technologies.
- We are simply, says Hydro, not proposing any
- 16 configuration past the approvals date. And that is a
- 17 creature of a different nature.
- 18 They haven't said what they want the
- 19 system to look like in the long run and then said well,
- 20 our approvals date has changed or more facilities have
- 21 fallen out of the time line. They have taken a date
- 22 certain. They have done the opposite. Rather than
- 23 develop a plan and say, here is the date to which we
- 24 need the approvals, they have said the opposite. They
- 25 say, here is the horizon we are looking at, 2001, and

1	we are no longer going to concern ourselves with what
2	the long-term plan looks like.
3	One of the very questions they pose in

One of the very questions they pose in the Update is they want this Board to give some views to assist Hydro in planning for the future. They say what is or should the appropriate role of fossil and nuclear be when we come to planning after the approvals? They don't say, here is our plan. Do you like it or not? They come and say, well, the ball game is now open again on that. We don't have a plan and we would like to hear what you have to say.

That, Mr. Chairman, in my respectful submission is an inescapable fact of what they have done; and that, if nothing else, must change the nature of the creature that we are dealing with.

THE CHAIRMAN: I take it that means in your submission that one of the blocks in the foundation of their planning process; that is, the concept of having candidate plans - they had something just under 30 candidate plans - that that has all been scrapped. Is that a necessary follow from that. There is now no such thing as a candidate plan?

MR. MARK: They say, Mr. Chairman, in the DSP Update at two places. Page 33, requested approvals at the top of the page of the Update Exhibit 452:

1	Approvals are no longer being
2	requested for major fossil and nuclear
3	facilities.
4	I think that is rather unambiguous
5	statement, Mr. Chairman, respectfully. They are no
6	longer asking this Board for any types of major new
7	facilities approvals.
8	THE CHAIRMAN: I don't know if I have got
9	this clear. But there was a Plan 15 at one time.
0	MR. MARK: Yes.
1	THE CHAIRMAN: Now Plan 15 had, as you
2	say, a comprehensive technology-specific outline.
.3	There were variations within it depending on low
4	variation and one thing or another. But there was a
.5	plan going to the end of 2014.
.6	MR. MARK: Yes.
.7	THE CHAIRMAN: They didn't ask approvals
.8	of everything in Plan 15. They only asked for the
.9	approvals in Plan 15 that came within the five-year
0	action period.
1	MR. MARK: Yes, but those facilities, if
2	I may, Mr. Chairman, those facilities took you I
!3	mean, they were asking for approvals for things that
24	needed to be started within five years from the end of
5	the hearing. But those facilities took you out to

1	2014. The only things that didn't fall within that
2	approvals period was, I think, the add-on, the
3	combined-cycle elements to the natural gas stations.
4	But in terms of the virtually all the
5	major facilities needed to supply to 2014, they all
6	filed within the approval period.
7	Now it's interesting. Hydro acknowledges
8	in this document. It says, we will need major new
9	facilities by 2014. They acknowledge that and they say
10	we simply don't want to discuss it now.
11	What is more intriguing, Mr. Chairman, if
12	you look at this artifice of the five-year action plan,
13	it intrigues me.
14	THE CHAIRMAN: Artifice is slightly
15	pejorative, wouldn't you say?
16	MR. MARK: My apologies, Mr. Chairman.
17	All they ever said in the DSP initially
18	was they have after they develop the plan, they came up
19	with a five-year action plan. And in the DSP they said
20	that means we want approvals on things we have to start
21	by 1996. They never said, they never said that it was
22	the five-year concept as opposed to that date they had
23	chosen which was the key. The five-year action plan is
24	had a red herring. It deals with the timing of the

25 approvals and not with the plan.

1	What is more interesting, Mr. Chairman,
2	if Hydro is true to the their course in this, if they
3	are true to their course in this they say what we need
4	to be safe so as to not have dated approvals is we want
5	to be able to proceed with things that we have to
6	proceed with within five years from the end of this
7	hearing.

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That determination of what will be in that package depends on two things, which are presently unknown. It depends upon when this Board makes its decision and it depends upon this Board's determination of the lead times for the various facilities.

If that really was the concern and the driving force, which I think it initially was, of the five-year action plan, Ontario Hydro wouldn't today arbitrarily take out of the plan every new major future supply facility. It does not know when this hearing will end. In some intervenors' views, we are going to be here for a couple of more years; nor does it know what your view as to the lead times will be.

Ontario Hydro is now taking it out of this Board's power to say, maybe you are right that we won't need a nuclear station till year 2009, but one would think if the action plan was still being advocated in the same way it was initially that Ontario

1	Hydro would at least leave open the possibility that we
2	are going to be here to 1996 and that it is a 15-year
3	lead time and that therefore it would fall within the
4	approvals spectrum.

They have turned it upside down. They have let the five-year action plan date govern them today in just tossing out the major future facilities.

Turning to this strategy component, Mr.

Chairman, and you have heard it before and I don't

think amongst the major intervenors there is any doubt,

and I think there is general consensus, that there has

been a significant strategic change in the plan by

moving to the planning to the median approach.

The planning to the upper approach -- and there is a distinction, Mr. Chairman, I ask you to bear in mind, which is between planning to the upper and building to the upper. Planning to the upper, as Hydro explains in its original documents, means getting the approvals in the event you need them; and if you don't need them, you don't build them. If the load grows closer to the median than to the upper, you defer your commitment date. You don't defer your approval. That was the concept of planning to the upper.

Ontario Hydro has changed planning to the median. Planning to the upper is - I don't think there

1	is any dispute - one of the enumerated and specified
2	components, No. 2.2.4 the demand/supply planning
3	strategy.
4	We have been here for ten months of
5	evidence and we know that the plan was constructed on
6	the philosophy of obtaining the approvals necessary to
7	meet upper load growth if it came about.
8	[10:25 a.m.]
9	Mr. Howard, in his opening remarks,
.0	referred you to a paragraph contained on page 18-2 of
.1	Exhibit 3. I would like, Mr. Chairman, to refer to you
.2	the preceding paragraph that Mr. Howard did not refer
.3	to, at page 18-1. The very bottom of the right-hand
. 4	column:
.5	"As stated in the demand/supply
.6	planning strategy (Element 2.2.4), the
.7	preparations for the options (definition
.8	phase) will be taken in time to meet the
.9	upper load projection, while avoiding the
20	cost of premature commitments.
21	"The action plan includes the
22	facilities for which an environmental
23	assessment document is expected to be
24	submitted before December 31, 1996, based
25	on meeting the upper load forecast. If

1	the actual load trend is below the upper
2	forecast, the project commitments will be
3	delayed to the "just-in-time"
4	requirement."
5	And now Ontario Hydro, Mr. Chairman, and
6	expressly they admit this in the Update document, they
7	have abandoned planning to the upper and they have
8	adopted planning to the median, what does that mean?
9	What it means is that you no longer seek
10	approvals that might on your own load forecast be
11	necessary to meet the upper load growth.
12	What they say is, we will only obtain, we
13	will only plan to the median, and if load growth is
14	closer to the upper, we will have to start the
15	approvals process from scratch again.
16	You don't want have to take my word for
17	it, Mr. Chairman, page 21 of Exhibit 452. The second
18	paragraph, under item D, Cost Considerations, page 21:
19	"If Ontario Hydro were to focus plans
20	during the period 1992-1996 on the
21	current median load forecast, and were
22	faced in early 1997 with a realization
23	that load growth was actually tracking
24	toward the upper load growth forecast,
25	the approvals process for new base load

1	generation would have to be started from
2	scratch and heavy reliance placed on CTUs
3	and/or additional non-utility generation,
4	at least until more economic new base
5	load generation could be approved and
6	installed."
7	Mr. Chairman, we have been hearing ten
8	months of evidence about the way you play this game and
9	the way Hydro decided from 1984 with all its hearings,
10	that the way you do this is you get approvals for what
11	you may need at the upper because the object of the
12	exercise is to obtain the most economic plan.
13	Now Hydro says, we are going to go about
14	that a completely different way.
15	From a utility planning perspective, Mr.
16	Chairman, that makes the world of difference. It's
17	obvious it makes a world of difference, and I have put
18	before you, Mr. Chairman, affidavit evidence of an
19	expert in utility planning, it's in my motion record,
20	Dr. Yokell who has many years of experience, who makes
21	the point quite clearly. And I urge you to read the
22	affidavit, Mr. Chairman, but to I think fairly
23	paraphrase it, he says from a utility planning
24	perspective, the nature of the creature we are now
25	dealing with is markedly different. The implications

1	for your system configurations and for your system
2	economics, are completely different. If all you do is
3	you take a 5-year horizon, you get approvals to the
4	median, and if the load forecast goes to the upper, you
5	backstop for now with expensive options and we come
6	back and start the process again for the facilities we
7	will need to 2014. I don't think one has to be an
8	expert in utility planning to know that that is a very
9	different creature.

Of course, that's why we get back to short-term plan. That's why Hydro backs out all the major future supply facilities, because it is just planning to the median.

If you are going to eschew entirely planning for any outcome other than the median we don't need to concerns ourselves today with facilities that may be needed when events five years from now unfold. They have simply deferred the debate.

I can't conceive, Mr. Chairman, that this Board or anyone in this room thought at the beginning of the process that's what we were doing here. If all we wanted to do was to say, what is our median forecast for five years, and what is the ranking of options to achieve that, you wouldn't have this assembled multitude.

1	I think, Mr. Chairman, while Hydro may be
2	interested in this Panel's views on what roles these
3	options should play in the future, I respectfully
4	suggest that this Board should not be mislead into
5	thinking that that is legitimate argument for saying
6	that future long-term plans are still on the table;
7	they are not, by Hydro's own documents.
8	The fact that they may be interested in
9	having the reviews is simply of no moment.
10	Now, Mr. Shepherd urged upon you that in
10 11	Now, Mr. Shepherd urged upon you that in consideration of public expectations and in the
11	consideration of public expectations and in the
11 12	consideration of public expectations and in the expenditure which has gone on to date you should that
11 12 13	consideration of public expectations and in the expenditure which has gone on to date you should that take up that expectation from Ontario Hydro, with the
11 12 13	consideration of public expectations and in the expenditure which has gone on to date you should that take up that expectation from Ontario Hydro, with the greatest of respect, Mr. Chairman, I suggest not.
11 12 13 14	consideration of public expectations and in the expenditure which has gone on to date you should that take up that expectation from Ontario Hydro, with the greatest of respect, Mr. Chairman, I suggest not.  This is a Board constituted under a

Ontario Hydro, in my submission, has defined the undertaking. The future plans beyond the immediate approval period are not on this table, and this Board respectfully should resist invitations from

somebody authoritative to make some comment pro or con

with a variety of private agendas to try and get

on some particular option.

1	parties to embark upon inquiries which are not remitted
2	to it.
3	Mr. Chairman, just lastly on this subject
4	of the difference, the fundamental difference between
5	planning to the upper and planning to the median. I
6	think the most graphic demonstration comes out of
7	Ontario Hydro's own evidence again.
8	If I could ask you, Mr. Chairman, to turn
9	in the Update, Exhibit 452, to page 14. Figure 7-1
10	shows the need dates under the updated, the updated,
11	the new load forecast. This graph shows, if you look
12	at the dotted line on the left, that if load growth
13	goes to the upper, the need date for major new
14	facilities is 2001.
15	So if you take Hydro's undisputed
16	original planning philosophy under the present load
17	forecast, they would necessarily be here before you
18	today seeking additional facilities approvals. If we
19	look on page 15, the middle paragraph:
20	"Under upper load growth, there
21	remains considerable urgency if
22	flexibility to employ major supply is to
23	be retained."
24	Now, maybe, Mr. Chairman, maybe at the
25	end of the day Ontario Hydro is right in changing its

- philosophy. That's not the debate before you today.
- 2 But there can be no dispute that they have changed the
- 3 philosophy and it is impact on the nature of what we
- 4 are doing is fundamental.

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5 To suggest that under one plan they would

6 necessarily be here before you, to realize that under

7 one plan they would still be asking for approvals

8 regardless of whether it was nuclear or fossil or

donkeys on a treadmill, and under this plan, their new

10 planning philosophy they say even if under our original

11 we would need it, we are not asking you for it, is I

think, Mr. Chairman, to highlight the point.

When considering, this, Mr. Chairman, I ask you to bear in mind what I suggest is one final test. Hydro in its original fillings was obligated by the statutes to identify and conduct environmental

analyses of the alternatives and alternative methods.

I suggest to you, Mr. Chairman, there is no dispute that the plan now before you in the form of the Update document was not identified. Indeed, it is a completely different strategy. By the DSP's own

terms it was, as I said before, outside of the white

lines of the ball field. It wasn't and it couldn't

have been one of the alternative methods of carrying

out the undertaking. Whether it could or couldn't have

1	been, it clearly wasn't discussed by Hydro as an
2	alternative.
3	I suggest to you, Mr. Chairman, that it
4	is then almost axiomatic.
5	If Ontario Hydro did not nominate it as
6	either an alternative method or even as an alternative
7	to the undertaking, although I am not sure they tried
8	to identify any of those, but certainly if it's not
9	identified by the proponent at the outset as an
L 0	alternative method, it must now be something completely
11	different.
12	What Hydro suggests to you by saying that
13	Oh, it is just an alternative method of carrying out
14	the undertaking, is that under this environmental
15	assessment process it can take something which in ten
16	years of study it never considered to be a real
17	possibility, and now drop it in our laps in the middle
18	of the hearing and say, it's just an alternative method
19	of carrying out the undertaking. That can't be.
20	If it was in that ballpark it should have
21	been the subject of the environmental assessment in the
2.2	first place.

At best, Mr. Chairman, Ontario Hydro, for some reason chose not to discuss it as an alternative to the undertaking when they discussed all the other

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,	alternatives and alternative mathed of severity at
1	alternatives and alternative methods of carrying out
2	the undertaking. But that, in my submission, Mr.
3	Chairman, is simply no excuse.
4	There is a process for the identification
5	and the discussion and analysis of those, and Ontario
6	Hydro, in my submission, must concede and this Board
7	must find, that if it wasn't presented as an
8	alternative method it cannot now be considered as that
9	from the proponent.
10	Other people may bring in alternative
11	methods in the hearing, but when we are discussing here
12	is what the proponent can could can do.
13	MS. PATTERSON: If others can bring in
14	alternative methods of carrying out the undertaking
15	during a hearing, why can't the proponent?
16	MR. MARK: I think, Ms. Patterson, we
17	have to go back at this point I think to the whole
18	structure and the purpose of the Act. It was clearly
19	designed to avoid a situation where a proponent and
20	other interested parties simply come to a table and
21	they open their briefcase and they say, here are a
22	bunch of ways of doing something, now let's discuss
23	them.
24	The proponent has a particular place in
25	this process and it has particular obligations in the

1	process. It has the responsibility under the Act to do
2	the criteria selection, to do the study, to do the
3	analysis selection and to prepare the environmental
4	assessment, to submit it to government review, to
5	submit it to public review, and then come to the
6	hearing. It is the proponent and it has those
7	obligations.

I suggest to you that to interpret the

Act to say that a proponent, who has those obligations,
can effectively dispense with them by getting the
hearing started on one method and then coming in the
middle and saying, here is another method and I haven't
had to subject that to the prescribed processes and
studies and public review and government review, is
simply entirely inconsistent with the purpose of the

Act.

We may be here in part to permit others to suggest that there are different ways, but that is not the province, in my suggestion, of the proponent.

Could Ontario Hydro, Mr. Chairman, come now -- because I think we are somewhat influenced by the fact that there are similar components, but could Ontario Hydro come now and say, well, we are going to put solar panels in everybody's house, or some of the other more extreme suggestions we have heard at the

1	hearing. They may be alternative methods. And I think
2	perhaps by looking at the extreme examples, you can
3	nonetheless appreciate the sense that the procedure in
4	the Act makes.
5	[10:40 a.m.]
6	Mr. Chairman, I want to turn now from the
7	subject of the definition of the undertaking to the
8	question of the deficiency of the environmental
9	assessment. I have already touched on some of the
10	issues which arise here, but there are some additional
11	points to make as well.
12	I won't repeat, Mr. Chairman, what the
13	obvious scheme of the Act is in terms of the process
14	and the studies and analysis that the proponent is
15	obliged to go through before this hearing even
16	commences.
17	And there is certainly no provision in
18	the Act which permits the proponent to dispense in any
19	way with the Environmental Assessment process,
20	particularly with the preparation of the environmental
21	assessment document.
22	Whatever authority there may be for the
23	proposition that the evidence taken at the hearing can
24	be used to supplement the environmental assessment

submission and to make a determination of the

1	sufficiency of that document, there is no authority for
2	the proposition that the proponent can simply dispense
3	with its preparation and come to the hearing to present
4	its assessment. In our submission, Mr. Chairman, that
5	is exactly what Ontario Hydro has done.
6	As I have indicated before, Mr. Chairman,
7	this Plan is clearly not one of the candidate plans, be
8	it the three candidate plans that are ultimately put
9	forward, or as far as I tell, any of the couple of
10	dozen plans that were generated by computer and not
11	even subjected to the analysis. This is one
12	alternative that didn't exist for practical purposes
13	when this document was prepared. So I say on the face
14	of it there can be no dispute that it wasn't subject to
15	environmental assessment document.
16	Mr. Chairman, Ontario Hydro describes
17	both the importance and the significance of the process
18	of doing a systematic environmental assessment. It
19	also describes the rules it prescribed for itself in
20	carrying out that process. This is found at page 1-7
21	of Exhibit 3.
22	Mr. Chairman, while it is a somewhat
23	lengthy passage, in my submission it bears review in
24	its entirety.
25	Beginning at very top of page 1-7,

1 "Priorities, Strategy, Plan": 2 "In March of 1989 Ontario Hydro 3 completed development of the demand/supply planning strategy. This 4 strategy was a culmination of a five-year 5 6 planning process involving the study and 7 testing of options, public input on values, and the development of a strategy 8 9 to assist in the identification, evaluation and selection of options and 10 11 plans. The demand/supply planning 12 strategy (DSPS) is included in Appendix 13 1. The DSPS is a set of principles, 14 priorities and quidelines which provide 15 the basis for planning -- setting out the 16 rationale for a consistent approach in 17 making judgments and decisions about such 18 plan elements as costing principles, 19 resource preferences and evaluation 20 criteria. The Proposed Plan is based on 21 the demand/supply planning strategy. 22 "In preparing the strategy, the focus 23 was on the development of planning 24 principles and priorities, electrical service values, and various supply and 25

1		demand options. For the Demand/Supply
2		Plan, the focus has shifted to the
3		preparation, review and approval of
4		definitive plans and proposals."
5		I just pause there, Mr. Chairman. You
6	can certainly	see the foundation that the DSPS
7	provides.	
8		Now we continue:
9		"The work to develop a long-term
10		demand/supply plan focused on identifying
11		a 25-year proposed plan - and an
12		associated shorter term action plan -
13		which best reflect the planning strategy.
14		During the process, a large number of
15		different plans - called cases - were
16		studied. Each of these considered a
17		different combination of options.
18		Evaluations led to three alternative
19		plans known as candidate plans.
20		"The Strategy sets out criteria for
21		developing and assessing alternative
22		plans. All alternative plans considered
23		in the evaluation had to meet
24		environmental and reliability
25		requirements and standards. Further

1	analysis also evaluated each case on
2	criteria such as resource preferences and
3	provincial economic impact.
4	"An environmental analysis of
5	alternative plans was also undertaken.
6	Natural and social environmental criteria
7	were identified. The environmental
8	effects of the demand management,
9	non-utility generation hydraulic plans,
10	and the major supply plans were
11	identified and analyzed along with
12	potential for mitigation of adverse
13	environmental effects. The results of
14	this analysis are presented in the
15	reference report, Demand/Supply Plan,
16	Environmental Analysis Report."
17	Mr. Chairman, they had a process of
18	taking not just - and this is an important
19	distinction - not just doing environmental, and when I
20	say environmental I mean social economic and the
21	natural environment. Of subjecting not just the
22	components of the plan to those analyses, but taking
23	the candidate plans each of them in their entirety and
24	subjecting them to that analysis.
25	Because we know from the evidence we have

heard that these plans are far more than just the sum
of their parts. They are integrated plans where the
total impacts, be they economic, reliability, system
configuration, natural environment, are distinctly
different from plan to plan regardless of whether the
components in generic senses are the same.

Ontario Hydro produced what we have in this hearing alone is Exhibit 4, which is a lengthy document, Mr. Chairman. I won't take you through it now but if you examine it - and I suggest you do with the greatest of respect carefully - they take each of the plans. They start out the document by establishing and selecting their evaluation and screening criteria. They say, here are the tests the evaluative methodologies to which we will put each of the candidate plans and they go through lengthy assessments of each plan in terms of how they stand up to those tests.

The plan we now have before us in the Update has not been subjected to that. Ontario Hydro has not even purported to suggest that they have put this plan to that same analysis.

They may say, Mr. Chairman, that well, we did an environmental analysis and included the hydraulic component. We did an environmental analysis

- 1 of the candidate plans and it included the Manitoba 2 transmission. But I respectfully suggest, Mr. 3 Chairman, that we know at this point in the hearing 4 that that simply is not sufficient. That is not the way this process works. And the proof again is in 5 6 Ontario Hydro's own documents. THE CHAIRMAN: But what is left in 452 at 7 8 the moment, as far as approvals are concerned, is the Manitoba transmission--9 MR. MARK: Yes. 10 11 THE CHAIRMAN: -- the hydraulic, and the 12 radial transmission relating to hydraulic. Those were 13 common elements in every one of the plans that were assessed. What has happened is that all the common 14 15 elements remain and all the variable elements have gone in your submission, if I'm hearing you correctly, your 16 17 analysis of what is there.
  - MR. MARK: Two responses. I rather disagree, Mr. Chairman. Two response. Number one, let's not forget the fossil extension option. If you want us to discuss whether environmental analysis issue should be done twice, almost twice as much of the common elements are now with the fossil. And whether Ontario Hydro can convince you that by using the word "rehabilitation", the concept was in the original DSP,

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1	you can look under, over, through and in between their
2	environmental assessment documents and you won't find a
3	life extension program analyzed in any of the same
4	terms. That's number one.

Number two, Mr. Chairman, the point I was endeavouring to make before and what I was just going to go on to with another example is if you take the environmental impact as we know it must to include things such as economic impact, Ontario Hydro has never in any of its plans assessed what the economic impact is of adopting the type of planning strategy it now advocates. The social impact, the employment impact. All of the candidate plans had tremendous construction in them. It is now proposing a plan which has, comparative speaking, minimal amount.

The whole exercise of the environmental assessment document, Mr. Chairman, was to take that global perspective; take the plans as more than the sum of the individual components. And if that was not an appropriate way to do it, Mr. Chairman, they wouldn't have done it. They took not the discrete elements and subjected it to the analysis. They took the whole of Plan 15 and they subjected it to the analysis criteria. They took the whole of Plan 22, did the same exercise. They took the whole of Plan 24. They did the same

1	exercise.	Then	they	compared	the	results	of	the
2	analysis o	f the	compo	sites pl	ans o	on their	own	١.

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You can't then, in my submission, having adopted that rubric, that approach for doing your analysis, and then bring another plan in from the side and say, we don't have to follow that. We can pick and choose the little pieces from each and we can tape and stick something together. A, it is not what the Act is about. It certainly contravenes that. And B, it is not consistent with the own approach that they put in Exhibit 3 which is how it is to be done.

Mr. Chairman, in my submission you are left then with one of two conclusions with Ontario

Hydro not having done the same analysis that it subjected the other plans to. You are left with one of two conclusions.

You must conclude either that the new plan is of such a different nature that it is not amenable to the evaluative criteria and techniques that Ontario Hydro thought were appropriate for its demand/supply plans. Or you are left with the conclusion that such an evaluative procedure was appropriate but Ontario Hydro chose not to do it.

Either conclusion, Mr. Chairman, in my submission is fatal to Ontario Hydro. If the Update is

simply not amenable to evaluation by the same criteria,
it must by definition be a new undertaking. If it was
amenable to evaluation by the same criteria and systems
but they haven't done it, they have manifestly failed
to comply with the provisions of the Act.

And if they have failed at the outset, if they haven't done the document at all, Mr. Chairman, I fail to understand the submission that is in Ontario Hydro's material that they can nonetheless come to the hearing and give you the evidence. Surely there is a threshold. Surely there is a precondition to at least carry out the exercise.

And this Board in another case, Mr.

Chairman, has made it very clear that the heart of this

Act and the ultimate test for the proponent is to

manifestly demonstrate to the Board that it has, prior

to ultimate selection of the final plan, done that

planning process.

The landfill case involving Meaford, Mr. Chairman, dealt with the selection of a site and the issue was how had the proponent gone about selecting the site. Had it without examining particular sites set up criteria and a system of applying a criteria, those criteria, to then identify candidate sites and then selecting a preferred one? Because if it hadn't,

1	the Board was concerned that there was certainly room
2	for the view that what the proponent had done is
3	selected a site and then gone about rationalizing the
4	selection.
5	I say to you, Mr. Chairman, that
6	obviously - whatever view you take of any of my other
7	submissions - is the risk we run at this hearing and
8	that is the MEA's concern. Ontario Hydro spent years
9	developing its initial plan. It spent at best weeks
10	developing this plan with no public consultation and no
11	government review. The question looms large and is the
12	ultimate question: Is there a risk that this plan was
13	first selected and now is being justified?
14	[10:55 a.m.]
15	Again, Mr. Chairman, I remind you, they
16	may be right in the end, but the process is the
17	concern.
18	In the Meaford case, Mr. Chairman, and I
19	will just read the passage, it's lengthy, I haven't
20	reproduced it. If you want to read the exact passages
21	I am sure it would be available to the Board.
22	The application was dismissed in that
23	case. The issue was first framed at page 24 of the
24	decision by the Board, it says, and I am quoting:

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The fundamental issue here regarding

1		the requirements of the Act is whether a
2		planning process leading to the selection
3		of the preferred alternative, the
4		undertaking, is required under Section
5		5(3). The proponents contend that such a
6		planning process, though desirable, is
7		not required.
8		The Board concluded differently, Mr.
9	Chairman. At	page 30 they say:
10		At a minimum the planning process will
11		entail the establishment of criteria for
12		the identification and evaluation of
13		alternatives, and the assessment of the
14		relative importance of the criteria, so
15		as to establish an evaluation framework.
16		Without such planning an acceptable
17		evaluation cannot be done. This is
18		because if such planning is not done
19		prior to the selection of the preferred
20		alternative, the evaluation cannot be
21		fair. What will invariably happen is
22		that after the alternative is selected,
23		the criteria will be established and
24		prioritized and the evaluations will be
25		carried out, consciously or not, to

1	achieve the result that the undertaking
2	selected is the best one.
3	And finally, Mr. Chairman, I quote from
4	another case, North Simcoe, and it is an apt one at
5	page 73.
6	The difficulty with this well
7	intentioned approach, the one taken by
8	the proponent, is that it overlooks the
9	relationship between process and results.
10	If the process is flawed, a question mark
11	hangs over the results.
12	And they dismiss the application.
13	Mr. Chairman, Ontario Hydro has premised
14	this Update on the new lack of urgency because of slow
15	load growth.
16	In my respectful submission, there is no
17	justification for having proceeded as it did, not only
18	to develop the new plan in just weeks, but then to
19	present it without even purporting to subject it to the
20	analysis it itself says should be undertaken.
21	A concrete example, Mr. Chairman, by
22	interrogatory we had asked for the LMSTM input and
23	results. We know after this much evidence that that is
24	the seminal document. If you are to look at a plan as
25	an integrated plan, certainly from the MEA's

1	perspective, looking the at the utility planning
2	exercise, that is the seminal document.
3	Ontario Hydro provided us with the LMSTM
4	inputs and results which they say support it, the
5	January 15th Update.
6	The vast majority of the contents of that
7	document - and it is now an interrogatory, it's on the
8	record - were dated after January 15th, after January
9	15th.
10	Mr. Chairman, that raises squarely the
11	spectre that was considered in the Meaford case. Why
12	didn't Ontario Hydro do the modelling that it needs
13	to come up with the plan wasn't done before the date
14	the plan was propounded to this Board.
15	One now, in this unfortunate situation,
16	which is of Hydro's making, cannot avoid the conclusion
17	that is a question mark hangs over the issue of whether
18	this was a plan that was developed after the
19	application of an appropriate process, or whether it
20	was a collection of much more looser judgments which is
21	now going to be justified.
22	MS. PATTERSON: So, I take it, Mr. Mark,
23	that your submission is that Hydro could not bring in
24	further evidence throughout the rest of its case that

would in fact create the basis to remedy the problems

1	that you see with the environmental assessment?
2	MR. MARK: That's correct. Hydro, in my
3	submission, has to the process has to be started
4	again and done correctly.
5	It may be fundamentally fatal anyway.
6	Certainly, if you dismiss the application on that
7	basis, one of the concerns is the proponent has
8	preselected and there is not much you can do about
9	that, but what you do is you send the proponent back to
10	follow the prescribed process, that includes public
11	consultation and the selection of the criteria, it
12	includes government review, all those steps.
13	One of my fundamental submissions is
14	those steps shouldn't be circumvented. And there is a
15	great danger in simply at the hearing, and partway
16	through the hearing, bringing in the wheelbarrow and
17	putting it on the table.
18	If we are going to pay respect to the
19	processes prescribed in the Act, we should. And if we
20	are just going to have hearings where it's a
21	free-for-all and everybody come and we don't care if
22	the alternative plan has been subjected to public and
23	government review and the rest of it, let's have a
24	different process.

In my respectful submission, the Act

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1	demonstrates that this public hearing is not, while it
2	is important, it is not viewed as the only place where
3	the inputs are to come into the planning process.
4	There is much more to it than that.
5	THE CHAIRMAN: What you are saying does
6	then imply that it almost makes this process
7	impossible, because of the dynamic nature of the
8	issues. It's trite, everyone agrees that these issues
9	do not stand still, and it would be irresponsible for
10	any proponent, reviewing a situation and seeing a
11	change, not to respond to that change. But then, on
12	the other hand, if that meant then shutting down the
13	hearing and going back to pre the strategy and doing
14	the consultation and doing all those things, there
15	would never be an end result. That's really what is
16	troubling me.
17	I don't quarrel with the logic of what
18	you are saying, it's quite persuasive. But I wonder
19	how then do you really work the process, because in the
20	context - just to finish the thought - in the context,
21	there has to be some flexibility in the planners to
22	review and revise their plan.
23	MR. MARK: There is no question about

nobody says that the nuts and bolts have to go in all

that, Mr. Chairman. As I indicated at the outset

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1	the same holes that they did. Let me make two
2	observations.
3	The first one is, one must a appreciate
4	how Hydro responded to the changed circumstances.
5	Recall that the original plan had as one of the
6	fundamental precepts the mechanism built into it to
7	respond to different load growth, higher or lower,
8	different demand management results and different NUGs
9	results.
0	If you will give me just a moment, Mr.
1	Chairman, yes, page 19-1, second paragraph on the page:
2	A flexible program is required by
3	Ontario Hydro because of the
4	uncertainties associated with the various
5	components of the Demand/Supply Plan.
6	For example, if the load is higher than
.7	the median forecast, action must be taken
.8	now to maintain a reliable supply.
.9	Similarly, if the load is lower than the
0	median forecast, or contributions from
1	demand management and contributions from
2	non-utility generation are higher than
:3	forecast, commitment to the construction
4	of major supply facilities can be
!5	delayed.

1	Mr. Chairman, I don't have to remind that
2	you that those three factors are the principal changed
3	circumstances that Ontario Hydro cites as having
4	justified the Update.
5	Now, their original plan had built into
6	it the mechanism for responding. So what Ontario Hydro
7	has done is they have responded by saying, we want to
8	change horses completely.
9	Their plan gave them a mechanism for a
10	response. And if the question, Mr. Chairman, was, do
11	we have a process which doesn't permit responses to
12	changed circumstances, I say not only does the process
13	permit it, their own plan did. But if the proponent
14	wants to change the horses completely, Mr. Chairman, I
15	respectfully suggest it must go back to the start.
16	DR. CONNELL: Mr. Mark, just follow
17	through your own scenario, though. We are now, let us
18	say, eight years into this process and we are still far
19	from the end point. Let's suppose your view prevailed
20	and Hydro did go back to the beginning of the
21	consultation, the options, the strategy, and let's

they might be ready to come back to the starting point

of this process, and let's suppose they put before us a

suppose they completed that phase of it much more

speedily this time, and in as little as three years

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1	range of options which did not incorporate major
2	supply. Just a year into that process the need for
3	major supply becomes evident, you would be appearing
4	before the Board at that time arguing what?
5	MR. MARK: I think you raise a good
6	point, Dr. Connell, and the answer is this: It seems
7	to me that what the proponent has an obligation to do
8	in fact, is if they are engaging in long-term planning
9	exercises, then they must, as they endeavoured to do in
10	the original DSP, have a plan which will respond to the
11	changing realities. And originally they had that.
12	Certainly from my client's perspective one of the
13	features, one of the features of the plan that they did
14	like was that as a long-term planning exercise it had
15	built into it the flexibility to meet the different
16	scenarios. And if the proponent were to come back two
17	years or three years from now with a plan which was
18	demonstrably on its face unable to respond to
19	realities, then the obligation of this Board would be
20	to say, not we have got to let you open the door and
21	put more facilities in; the response is, you have done
22	the exercise wrong. Your job, Hydro, was not to put
23	yourself in this province in a planning strait-jacket.
24	Surely that's the answer, Dr. Connell, to
25	say your planning exercise is wrong; it's not to say

1	maybe it's wrong but once we are here let's open the
2	door and we can put in more facilities.
3	DR. CONNELL: Yesterday Mr. Howard said,
4	and I will quote from the transcript, this is Volume
5	119, 20684:
6	"it is clear that the evidence with
7	respect to the nature of the undertaking
8	and the approvals is not complete and to
9	decide at this stage whether or not the
10	hearing should be terminated would be
11	premature."
12	Given the investment of eight years and
13	all the effort and funding of which we are all too
14	conscious, do you not think we should invest at least
15	another few weeks in hearing what Mr. Howard and his
16	colleagues may have to say, and his witness panels,
17	about some of the issues that you have raised and about
18	the nature of the undertaking and the environmental
19	assessment related thereto before reaching the
20	conclusion that you are pointing us toward?
21	MR. MARK: It is certainly an alternative
22	but I say it is just an alternative, Dr. Connell.
<b>2</b> 3	My first submission is this: There is a
24	salutary process in place. I respectfully suggest it
25	is improper to consider that it is just this hearing

1 forum in the next few weeks where the proponent should 2 be subjected to the environmental assessment process. 3 Ontario Hydro itself spent five years developing, in a consultative approach, as they pointed 4 out on numerous occasions in their documents, 5 developing a strategy based upon a consultative 6 7 approach. With the greatest of respect, I suggest 8 9 the answer to the present problem is not to say we 10 don't have to do that with the new plan, but let's just 11 hear some evidence at the hearing and let's have this 12 Board be satisfied on some of the evidence before it. 13 There is a process, prescribed in a process which Hydro itself thought was appropriate. 14 I suggest to you, Dr. Connell, whether 15 16 one in the end may agree with the plan or the evidence 17 here or the not, the process is one which is valuable and ensures that you are avoiding the planning problems 18 that I have referred to before. 19 20 It is not an easy choice. It is not an 21 easy choice at all and it was only with great trepidation that the motion was brought. But they do 22 23 have pending environmental assessments filed on all these facilities. They are there. They were going to 24

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dictate in the end the timing of the approvals in any

1 event. 2 It will not, in my submission, be an 3 onerous task for Ontario Hydro to supplement those 4 filings with what is, I say, lacking from this filing. They can either come back here or go to those hearings. 5 6 I would remind the Board that Ontario 7 Hydro itself says it's looking at a surplus to the end of the century. They changed the planning perspective 8 because there is not the urgency. And the government 9 10 has available to it the remedies, I suggest, to deal 11 with urgent situations which might arise. 12 I submit to you, Dr. Connell, that this 13 Board has a function to perform under the Act and our 14 concern is that this hearing not become an open forum 15 for things it was not intended to become. 16 The eight years of investment, Dr. 17 Connell, were with respect to another plan, and 18 respectfully I don't see the logic in saying because they investigated eight years in another plan they 19 should be able to expedite this plan. 20 21 DR. CONNELL: You have expressed some 22 concern about major supply, under this scenario that you have just formulated how would you envision new 23 24 major supply being addressed?

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MR. MARK: I think the first answer, Dr.

1 Connell, is if Hydro has its way and we don't want 2 Exhibit 452 we are not going to get it, so we are no 3 worse off. With respect, I don't see that as the 4 5 concern. Ontario Hydro are the ones who say if in 6 7 1997 it looks like we are tracking to the upper, we are 8 going to have to be back here or some other Board 9 seeking those approvals anyway. MS. PATTERSON: Doesn't your 10 11 interpretation, Mr. Mark, preclude any kind of 12 negotiation during a hearing process? 13 You are saying the other parties can't 14 persuade the proponent that they should change anything 15 because then the proponent would have to go back and 16 follow the whole process under the Act. 17 MR. MARK: There is, in my submission, 18 Ms. Patterson, there is a fundamental distinction to be made between what the proponent can do and the powers 19 of this Board at the end of the day. 20 21 Mr. Bullock yesterday urged that you 22 should take the view that because at the end the day 23 you would have the power to restrict Hydro for any 24 number of reasons to the approvals it is now seeking in

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the Update, that you should let the whole thing

1	proceed.
2	I say again what I said before, is that
3	the Act clearly, and for good reason sets out the
4	distinction between the proponent and the others.
5	It is now Ontario Hydro which is
6	identifying and advocating of its volition, on its
7	motion, this new plan.
8	Secondly, the public, in my submission,
9	has a right to know at the beginning if there a
10	fundamental change what it is that the proponent is
11	advocating. And they don't know that.
12	They got notice that there was a
13	particular plan with a particular time frame, with a
14	particular facilities that Ontario Hydro was saying was
15	the preferred alternative. Ontario Hydro now says no.
L6	In my submission, if Ontario Hydro, the proponent, is
L7	going to say no it is something else, then the public
L8	should be told that.
L9	THE CHAIRMAN: As a matter of fact, I
20	wrote down just before you used word, the word
21	"strait-jacket" in my notes. I am glad to see that you
22	also used it, because I think this is one of the

problems of your analysis, that you are putting too

much restraint on the proponent who comes in with a

comprehensive plan.

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Granted there certainly has to be procedural safeguards to allow that to happen, but I have some real concern. Here we are really talking about basically two things. One is the life extensions of the fossil plants and, two, the decision by Hydro not to specify which of the major supply options they wish to use because when major supply comes on, they can they need to have major supply but they want to defer the decision as to which one to pick.

Now, working backwards. They have fully consulted and gone through the process, at least they would say so, about the characteristics and nature of fossil and the characteristics and nature of nuclear, and all they are really saying, and maybe this is putting it another way, is they are both still options but we would like the opportunity to defer the decision as to which one we are going to select. That's one.

The other thing about the life extensions, that perhaps is a more difficult issue. I don't quite know what you might say about that. But there has to be, I guess, either the process becomes unwieldy and just unmanageable or else there has to be some flexibility.

MR. MARK: Mr. Chairman, I want to

1	respond first by just going back to your recitation of
2	the changes; and with the greatest of respect I think
3	you have omitted one.
4	THE CHAIRMAN: I expect I have omitted
5	more than one. [Laughter].
6	MR. MARK: But it's fundamental. If we
7	were to hear that because of some load forecast changes
8	or any other considerations, they want more fossil,
9	less nuclear, more nuclear, less fossil, any of those
10	rebalancing as was advertised, I wouldn't be making
11	this submission. But we can't forget the change in the
12	objective of the plan, the planning philosophy. There
13	is a difference not only in content but in objective in
14	risk, in reliability, in planning to the median as
15	opposed to planning to the upper.
16	Ontario Hydro says in its document - I
17	won't take you to the exact page reference - says it
18	entails more risk. It is a different planning concept.
19	I am in agreement with you, Mr. Chairman.
20	There shouldn't be a strait-jacket. If Ontario Hydro
21	has a plan and it continues with a plan which is based
22	upon its preferred strategy that it adopted in 1989, we
23	can rebalance, we can reshuffle, we can do most of the

cases that were on the table from the intervenors about

more DSM and less DSM and this and that, that is all

24

1 fair ball, but not when the proponent comes and says, I want to do something substantially different with my 2 3 enterprise. 4 The original plan had within it the ability to accommodate all this. And I say to you, Mr. 5 Chairman, if they want to change the purpose, the 6 7 objective and the nature of the enterprise, they do 8 start again. That is not an undue restriction in my respectful submission. There is a limit on what the 9 10 proponent can change before it is something 11 substantially different. 12 DR. CONNELL: Mr. Mark, responding to Ms. 13 Patterson you used the term "on its own volition" and 14 you have emphasized Hydro's initiative and choice. 15 Would you feel differently about this if it became 16 apparent to you that Hydro had modified its plan 17 because of the cogency of the cross-examination that 18 you and others have brought to bear, the illumination 19 of your exhibits, the penetrating insight in your interrogatories. [Laughter] 20 MR. MARK: That I would be very surprised 21 22 at. [Laughter] 23 Mr. Chairman, if Hydro changed to either some other scheme of facilities that it had available 24 to it the option to do within its original plan because 25

of those insightful questions, or if they changed to an alternative method of carrying out the undertaking that had been the subject of analysis and evaluation, albeit rejected by them at the end, I would not object. But in this circumstance -- and I go back They had a plan on the table which had the mechanism for accommodating all of these eventualities, all of them, and they chose to go with a different creature.

DR. CONNELL: But I think Ms. Patterson's point surely is that this process is not something entirely different and isolated from the consultation process which has led up to the hearing. It is part and parcel of it. And one expects the impact of that consultation to continue in a way.

While you say you would be surprised that there had been any impact on the Hydro, let me say that I would be equally surprised to find that 452 is created by a group of Hydro employees in a back room somewhere that were totally cut off from what is happening in this hearing.

MR. MARK: The other point though, Dr. Connell, and this is the one I was making on the submissions on the adequacy of the environmental assessment document. If the evidence at the hearing,

1	the cross-examination, the interrogatories, whatever,
2	demonstrated the rationale for the change, that's one
3	situation. One of our complaints is that Ontario Hydro
4	has made the changes and manifestly without
5	demonstrating the rationale

Let me give you a couple of examples. I was going to go on to this anyway. Ontario Hydro makes the observation, quite rightly, in Exhibit 452 that the linchpin of the decision to change from planning to the upper to planning to the median, the linchpin is what is called the penalty cost analysis. What's the cost of doing one and what's the cost of doing the other. That doesn't exist.

evidence at the hearing and we said to them, doesn't this show that this planning way is better than that planning way? But they have said that we made the judgment to change. Well, what they haven't filed with you, and we have put in evidence on this motion, put in an affidavit saying what was missing so that you couldn't do any orderly or intelligent analysis of this Update, haven't heard any response from Hydro. There doesn't appear be the penalty cost analysis.

So if the rationale isn't apparent, if they haven't done some studies, some document, some

complementary filings which demonstrate it at a level 1 2 which is minimally acceptable, I say no. 3 The life extension, Dr. Connell, is 4 another example. It would be one thing if at the 5 hearing there was laid evidence before the panel and 6 before Hydro which showed that it was economic, that showed what the long-term costs were, that showed what 7 8 the costs were vis-a-vis the other alternatives, 9 mothballing, et cetera. But you have heard the 10 evidence. I don't have to go through it in detail 11 Ontario Hydro has simply made a decision to change. 12 They don't have, even after the 13 cross-examination of Panel 8, they don't have the 14 supporting analysis which would be minimally 15 acceptable. And that I think is the key difference 16 between the two situations. 17 Mr. Chairman, I don't know if you want to 18 take a morning break. I am moving on to a couple of 19 shorter areas. I won't be unduly long. 20 THE CHAIRMAN: You do what you like. Ιt 21 is up to you. 22 MR. MARK: I would expect I would be 23 another twenty minutes or half an hour. 24 THE CHAIRMAN: Whichever you prefer. I

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have interrupted you once. If you want to keep going,

1 fine. If you want to take a break --2 MR. MARK: I am content to keep going, Mr. Chairman. I am in your hands either way. 3 THE CHAIRMAN: We will take a break. 4 5 THE REGISTRAR: This hearing will recess 6 for 15 minutes. 7 ---Recess at 11:27 a.m. 8 ---On resuming at 11:45 a.m. 9 THE REGISTRAR: This hearing is again in 10 session. Please be seated. 11 THE CHAIRMAN: Mr. Mark. 12 MR. MARK: Thank you, Mr. Chairman. 13 As usually happens, during the break I 14 had a chance to think a little bit further about Dr. 15 Connell's question. 16 THE CHAIRMAN: I know that always 17 happens. 18 MR. MARK: But in view of the importance 19 of the question, Mr. Chairman, unless you stop me, I am 20 going to take the liberty of making some further 21 comments on it. 22 To put it frankly, Dr. Connell, the 23 concerns you express are real and valid ones but it is a concern in my submission with the overall 24

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environmental assessment process. And this Board's

- task on this motion is to determine whether or not it

  is the same undertaking. In my submission, the

  legislation is clear. If it's not the same

  undertaking, this Board cannot continue. That there

  may be serious ramifications, as concerned as we all

  are about it, I say respectfully that is for others to

  address. Either it is the same undertaking or it's not
  - It is not this Board's province to say that we will be in a jackpot if the proponent cannot proceed today with a different undertaking.

the same undertaking.

The other point I think to be made, Dr.

Connell, goes back to the question of the plan versus

planning. And as said, one of the concerns we have is

whether the planning approach before coming up with the

plan, Ontario Hydro did the appropriate steps.

I think what the Meaford case says is that there is a great risk indeed in proceeding with the hearing and taking evidence at the hearing if the Board is of the view that the proper planning procedures haven't been followed.

But ultimately I think, Dr. Connell, the question is: Having regard to my submissions on the different nature of the purpose and the scope and the philosophy of the undertaking, whether it is different.

1	One of the intervenors preceding, and I
2	don't recall exactly who, it may have been Ms. Kleer,
3	referred the Board to a passage from the Ontario Hydro
4	southwest transmission case dealing with the Board's
5	ability to permit changes to the undertaking.
6	Again you have heard my submissions on
7	what constitutes a change when it is a different
8	undertaking. I suggest to you, firstly, that when the
9	Board there was talking about changes to the
10	undertaking, it was not in my submission talking about
11	the type of issue we had here.
12	But in any event, Mr. Chairman, what the
13	Board was saying there, and I will refer you to a
14	passage in a moment, was that it is within the province
15	of the proponent to perhaps at best change between as
16	its preferred alternative from time to time between its
17	identified alternative methods. But if you are to
18	accept that this decision governs you, and you have
19	heard my comments on change, I don't accept that in
20	this situation the undertaking can change.
21	What the Board said there, and I am now
22	at the Ontario Municipal Board Report, Volume 13, 1983
23	at page 275. They say:
24	The undertaking is really equated to
25	the proponent's choice from among the

1	alternatives.
2	And I suggest to you, Mr. Chairman, that
3	if we are to give any sense to the Act in the
4	proceeding, it must be at least from the menu of
5	alternatives that came to the Minister and that were
6	the subject of the assessment in the first place
7	because that's the undertaking that was referred to you
8	in the Act.
9	It's what the legislation says - and I
10	won't repeat it again - I think the common sense and
11	the purpose of the legislation tells us that what the
12	proponent can't do during the hearing is take an
13	alternative that wasn't in the original submission. If
14	you adopt that, Mr. Chairman, there is no incentive,
15	there is no incentive on a proponent to play all its
16	cards, put everything on the table to do the proper job
17	in the first place.
18	If you rule that a proponent can make
19	this type of change in the middle of the hearing, I
20	respectfully suggest it is going to be inordinately
21	detrimental to the process and a proponent knows that
22	it will be at liberty to identify itself a new
23	alternative method during the course of the proceedings
24	and put that before the Board.

The other thing the Board said in the

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1	Ontario Southwestern case. Same page, Mr. Chairman,
2	page 275, says:
3	It is arguable that a proponent may
4	define an extremely narrow undertaking
5	and this is a possibility. Ontario Hydro
6	could have described
7	And they were concerned about five
8	different transmission routes:
9	Ontario Hydro could have described the
10	undertaking to mean the transmission
11	system plan represented by plan M1.
12	Caution should be exercised, however,
13	before adopting this practice for the
14	identification of a more suitable
15	alternative may lead to a refusal to
16	proceed with the undertaking.
17	It is Hydro's right, however, to receive
18	an answer on any particular undertaking.
19	What we see there, Mr. Chairman, in my
20	submission is that the Board points out that it is
21	indeed up to the proponent to define the undertaking,
22	but it runs the risk, as I say Hydro has done here, of
23	defining it on terms which preclude you from finding
24	certain things as being alternative methods of carrying
25	out the undertaking.

1	mr. Chairman, I want to turn to the
2	question of public notice. We dealt briefly with that
3	at the outset. I don't want to belabour the point
4	again here, but as I indicated to you yesterday I
5	thought the discussion may make a bit more sense in the
6	context of what I have had to say about the import of
7	the changes and the rationale for the Act.
8	And without reading the passages again,
9	Mr. Chairman, I suggest to you that the notice of
.0	public hearing that was issued by this Board gives
1	notice to the public only of the proponent advancing a
2	particular long-term program having those elements.
3	This Board, in my submission, is simply
4	not in a position to say that there are not members of
5	the public out there who would have responded
6	differently had the Update plan 452 been presented to
7	them. If they had known, as I have submitted, that
8	Hydro is not planning beyond the five years, if they
9	had known there are no plans afoot, no approvals being
0	sought for major supply, if they new as Hydro states
1	about the increased risk factor, in my submission this
2	Board cannot assume that the public would, person for
3	person, have reacted the same to the notice.
4	At the very least, Mr. Chairman, I
5	suggest that the hearing cannot proceed unless a fresh

1	notice of public hearing is issued. But my first
2	submission on that is that this Board by its notice of
3	public hearing has prescribed the bounds of the hearing
4	and what the undertaking is for its consideration. And
5	it's my submission, Mr. Chairman, that on that basis
6	the hearing into 452 cannot proceed.

So in summary on the motion to terminate the hearing, Mr. Chairman, is that the undertaking is a different one with respect to which the Board has no jurisdiction to proceed. Ontario Hydro has withdrawn the original undertaking. You are in a decision today to rule that no environmental assessment which passes the threshold of acceptability has been filed in connection with this undertaking and the hearing ought to be terminated on that basis.

And lastly, the public notice prescribes the bounds of the inquiry and the inquiry that we will embark upon with 452 is not fairly described in that notice.

[11:55 a.m.]

THE CHAIRMAN: I asked you this
yesterday, and I'm not sure. You did answer but I am
not quite sure I understand what you mean by not fairly
described in the notice.

The notice is very comprehensive, it

1 talks about all the options, and talks about the hearing in the broadest possible terms, and would 2 3 attract the attention of anybody who was in any way interested in electricity demand/supply in the Province 4 5 of Ontario. 6 I can't even think of an example of 7 somebody who could come and say, because that's test whether anybody would be prejudiced by it, I take it, 8 who could come and say, this is something that I would 9 10 have responded to differently. 11 MR. MARK: Firstly, Mr. Chairman, let me 12 direct you to the portion --13 THE CHAIRMAN: I don't quite mean it that 14 way. 15 I didn't bother responding to this notice 16 because I wasn't interested and now I am because of 17 what has happened. 18 MR. MARK: The notice, Mr. Chairman, I think your question, if I may, is in two parties: Why 19 20 doesn't it fairly describe what is going on and could 21 anybody be prejudiced. 22. On page 1 of the notice it says: 23 Ontario Hydro has published a 24 Demand/Supply Plan report setting out 25 proposals to ensure that a continuing and

1	reliable electricity supply is provided
2	in Ontario. That report, and its
3	environmental analysis, have been
4	submitted for review under the
5	Environmental Assessment Act. Each
6	alternative Demand/Supply Plan
7	includes
8	And then the six bullets, all those
9	components.
10	At the very least, Mr. Chairman, Ontario
11	Hydro is now proposing an alternative Demand/Supply
12	Plan.
13	The notice, with respect, if 452 is
14	permitted to go ahead is inaccurate in its description
15	not just of the alternate plans, of the very one that
16	Hydro is proposing.
17	THE CHAIRMAN: Well, it's inaccurate
18	because of the inclusion of new fossil and nuclear
19	generation.
20	MR. MARK: Both. This says, each one
21	includes all of these, as all Hydro's candidate plans
22	did. They all included that, the new one does not
23	include all six, and secondly
24	THE CHAIRMAN: It includes five of the
25	six; doesn't it?

1		MR. MARK: But you say it doesn't say
2	each alternati	ve supply plan includes some of.
3		THE CHAIRMAN: No, I understand your
4	point.	
5		I am just saying it just to clarify in m
6	own mind your	analysis of the language.
7		The only one that now no longer applies
8	is new fossil	and nuclear generation.
9		MR. MARK: That's correct.
0		THE CHAIRMAN: The rest are all still
1	there.	
2		MR. MARK: Yes.
3		DR. CONNELL: And even 452 you might
4	still want a r	eference to fossil and nuclear. I
5	suppose you mi	ght deal with that by putting in an
6	asterisk rathe	r than removing them absolutely.
7		MR. MARK: What is listed here, Dr.
8	Connell, is ne	w fossil and nuclear generation. So I
9	think that wou	ld have to change.
0		DR. CONNELL: 452 doesn't preclude that
1	possibility, a	s I read it.
2		MR. MARK: Well, Ontario Hydro is not
3	requesting any	approvals for new major supply.
4		DR. CONNELL: Yes, but this paragraph
5	doesn't refer	to the approvals; it refers to the plan.

1	MR. MARK: Yes. The plan doesn't have it
2	within it. They don't propose it. They are saying
3	shelf that.
4	If they are not asking for approvals for
5	it, they are certainly not proposing it.
6	THE CHAIRMAN: Well, they are saying that
7	they will need new major supply, and they then invite
8	the panel on page 32, I think, to consider the fossil
9	and nuclear options.
10	MR. MARK: But they are not even asking
11	for approval of the requirement and rationale. They
12	concede they will have to start a whole new process.
13	What the utility is of the comments they
14	are seeking I am not entirely sure other than so
15	somebody at Hydro two years from now say somebody told
16	us it wasn't a bad idea to look at this road. Whether
17	you want that responsibility, Mr. Chairman, is I guess
18	for you to decide.
19	So those are my comments on the public
20	notice.
21	Mr. Chairman, except let me address the
22	second part of your question. I will summarize the
23	first. That suggests they are all included in the
24	alternatives. We clearly have an alternative that is
25	not. Plus there is a substantial new element in this

alternative which	is	not.
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As to the question of prejudice, Mr.

Chairman, I suggest to you that the test is, are you

prepared to definitively say no reasonable person would

have reacted differently.

I suggest to you in light of all my comments to date that the plan is of such difference that there are people who are interested in the issues but might not have responded because of the nature of what was being proposed was satisfactory to them or simply because - and we shouldn't underplay this factor - simply because if Ontario is there as the proponent of a certain plan, many people, I suggest to you, are going to say, fine, let Ontario Hydro carry that ball. Surely they can make as good a case as can be made for the plan that is described here.

I think with the greatest of respect, that one cannot say in this situation that there wouldn't have been other people, other organizations, other businesses, other interested entities would be here if they knew now what Hydro was proposing.

Mr. Chairman, if you do not agree that the hearing cannot proceed in the alternative, we are suggesting certain -- what we respectfully submit are minimal procedural matters that have to be imposed to

proceed fairly.

You have heard from other intervenors, and I agree, and the Board said in the Southwest

Ontario case that when you do have some changes in the hearing, natural justice has to be the watch word.

You have heard from me already, Mr.

Chairman, as to the serious deficiency in the accompanying or supporting documentation, leaving aside the question that it may not have been done before, it doesn't -- we don't have it at all, whether it exists or not.

Again, at this point, I won't take you to you chapter and verse, I urge to you read again the affidavit of Dr. Yokell which I filed who says quite simply there is a posity of information on the table which would permit an orderly analysis of the Update document to be undertaken.

You have heard already from many intervenors, from differing political stripes, who share this view.

I echo Mr. Heintzman's comments, Mr.

Chairman, there simply isn't even a rudimentary base of documentation from which to proceed at this point.

For starters - and I don't suggest the list is definitive - but I think if one takes our

1 attempts to educate ourselves in good faith, it is 2 illustrative. We have submitted a request to Hydro with literally dozens of fundamental studies and 3 documents which we say are seminal to starting the 4 5 analysis. 6 THE CHAIRMAN: You have done that through 7 the interrogatory process, have you? MR. MARK: Yes. We wrote a lengthy 8 9 letter to Ontario Hydro setting them out and they have 10 turned them into interrogatories. 11 But there must be a process, Mr. 12 Chairman, of permitting the intervenors the opportunity to identify two things: (A) what exists at Hydro 13 already, and (B), what they think might exist, or 14 15 getting data together at Hydro which although Hydro not have compiled in study format, et cetera, is relevant. 16 17 And indeed, Mr. Chairman, this is a 18

And indeed, Mr. Chairman, this is a situation where it may even be appropriate to oblige Hydro on certain occasions to actually undertake some work, study or analysis that had they have not undertaken to date.

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I cannot, as I stand here, identify for you one such instance because we are still waiting to hear from Ontario Hydro. But I think given the nature of the Update and how little was filed, there may be

some task which only Hydro could perform which the intervenors may wish them to undertake.

So, there has to be some process, whether we call it the interrogatory process or we give it some special definition now, Mr. Chairman, some stage of identifying what has to be produced, then permitting interrogatories on those before we can get up and go again.

Looking back on the beginning of the hearing, I must regrettably say I think that would be a process of several weeks. Mr. Heintzman suggested four weeks to get the material and then some time to assess it. It's not outside of the ballpark of a reasonable time frame. I would have suggested a bit more, but that's, I think, four weeks at least to identify and see if Hydro has this stuff, is not unreasonable.

Secondly, Mr. Chairman, it's my submission that the hearing ought not to proceed in the meantime.

I again refer you to the affidavit
material that I have filed, but I think we can
demonstrate rather easily that you can't quite simply
segregate all the evidence panels nicely and allow some
to proceed while this process is under way. Certainly,
the planning, Panel 10, can't come and give its

1	evidence while this process is under way, and I suggest
2	the nuclear panel cannot either.
3	THE CHAIRMAN: How do you distinguish the
4	nuclear panel from the fossil panel?
5	MR. MARK: Well, you will recall I was
6	before you about a month ago, Mr. Chairman, urging you
7	that we couldn't proceed with the fossil panel.
8	THE CHAIRMAN: Are you saying, with the
9	benefit of hindsight, that the fossil panel didn't give
L O	Hydro an opportunity to present its evidence and the
11	intervenors an opportunity to cross-examine on that
L2	evidence?
13	MR. MARK: There is no question we were
14	here, we had the opportunity, but I think two things
15	are evident from the fossil panel.
16	Firstly, Mr. Chairman, I can't tell you
17	today whether I have had my complete go at the fossil
18	panel until I have
19	THE CHAIRMAN: I take that point. I
20	understand that point.
21	MR. MARK: So why proceed, Mr. Chairman,
22	with nuclear if, when I get the answers to all these
23	things about the Update, I am going to have another day
24	of cross-examination on nuclear.
25	THE CHAIRMAN. If Hydro comes in with

- additional evidence of course there has to be an opportunity to cross-examine on it. That seems fairly fundamental.
- MR. MARK: The other point, Mr. Chairman,

  is that you certainly -- maybe the fossil panel was the

  converse, but you saw, amongst other intervenors, the

  MEA asking for an abundance documentation, of studies,

  of analysis, which fortunately for the hearing process,

  unfortunately for the hearing, Hydro just doesn't seem

  to have on the fossil.

But if the we get to the nuclear panel, I question the utility, Mr. Chairman, of really doing the document-finding exercise at the cross-examination.

If Hydro had half of the things we thought they ought to have had for the fossil life extension program, it would have been a fiasco. We would have had to have done the cross-examination over again. It went okay because they didn't have it.

If he they are going to have a raft of studies, they are going to have a raft of studies on nuclear, on the CANDU 6, on the other nuclear options, why should we proceed with the cross-examination before we have got that on the table, had interrogatories on it and then let's go about the task.

I am also at this point, Mr. Chairman,

- going to ask you to make an order that Ontario Hydro
  recall at least those witness panels who intervenors
  request be recalled.
- 4 The undertaking document, 452, without 5 any date is a comprehensive document. It does not just, as you have heard from me more than you care to 6 I'm sure, carve out a couple of approvals. It deals 7 with issues of reliability, it deals with issues of 8 9 load forecast. And Hydro may say, well, load forecast 10 hasn't changed since Mr. Burke was last before us, it's only the primary forecast which has changed, but 11 looking at Hydro has changed its outlook on how you 12 plan, Mr. Chairman, I can tell you standing here today, 13 14 there are additional issues to be pursued with the load forecasters. 15

Let me take the issue of peak demand.

The forecast of peak demand was an issue of relatively
little importance given the generation and supply mix
Hydro was originally proposing.

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What they are now proposing makes the plan and the system (A) far more sensitive to your forecast of peak demand, and the system is more heavily weighted in terms of supply with options which effect a change in your peak load.

That's but one example of why issues

1 raised by the Update may be new issues.

Let me raise another one. We had some discussion in the demand management panel about the issue of the uncertainty associated with the demand management forecast.

I say to you, Mr. Chairman, given the plan that Ontario Hydro now proposes, given the prominence of the role played by demand management and the absence of significance other new major supply for a considerable period of time, the issue of uncertainty associated with the DSM forecast and its impact on the uncertainty and its relationship with the uncertainty of the primary forecast takes on a new perspective.

Those are but two examples, Mr. Chairman. There are some more referred to in the written submissions, but if one understands the scope of the Update, it is not at all fanciful to suggest that many people are going to seek many new issues as we do already. Many people may want to explore in depth some issues which are of less significance before. And as somebody has said, if the chairs are changed so dramatically at the table, it's clear there is going to be a real and bona fide desire to have additional witnesses.

We are in the process of starting the

- effort of identifying those where we feel it's
  essential to have that additional opportunity of
  cross-examination. I ask you, Mr. Chairman, to give
  the intervenors the right to do that.
- 5 Mr. Chairman, I won't deal, pursuant to 6 your direction, I won't deal with the question of 7 intervenor funding at this time.
- So in terms of the procedural relief, Mr.

  Chairman, my first request is that you adjourn the

  hearing sine die, giving the parties the right to

  request production of documents from Hydro, and the

  hearing can be rescheduled once that process has been

  completed.

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- Alternatively, set a timetable for the production of documents. I have no fundamental objection to Mr. Heintzman's suggestion of four weeks and that we come back then and reset the schedule; ask that the interrogatory process be reopened for all panels, the plan is so comprehensive that ever panel is affected, and that you permit the intervenors to require to recall the witness panels who they wish to cross-examine additionally once the documentary production has been completed.
- And lastly, Mr. Chairman, and arising out of my earlier submission, even if you don't accept that

the public, the form of the public notice has an impact 1 2 on your ability to proceed, I respectfully suggest that 3 in any event the issuance of a fresh public notice would be in order. 4 5 Mr. Chairman, let me take a few moments 6 in concluding, because this will be my only opportunity 7 I expect to do so, to reply very briefly, I hope, to some of the objections taken by other counsel. 8 9 THE CHAIRMAN: Well, you will get an 10 opportunity to reply, but if you want to do it now, 11 that's perfectly all right. 12 MR. MARK: I am your hands, Mr. Chairman. 13 I have heard some of what they have had to say, if they 14 are going to speak again and you feel it's appropriate 15 to have me deal with it then, I am content. 16 THE CHAIRMAN: If you are ready to do it, why don't you do it now. 17 18 MR. MARK: Mr. Chairman, let me begin 19 with Mr. Howard's comment. Mr. Chairman, I asked to bear in mind 20 21 that Mr. Howard himself in his remarks posed the question one way at least is whether the matter before 22 23 the Board is of an entirely different nature. 24 So even Mr. Howard, Ontario Hydro I suggest on their own terms, don't suggest they have the 25

carte blanche to bring before you any proposal which 1 2 seems related. 3 Mr. Howard wasn't a lot more enlightening than that on Hydro's position. 4 5 Let me turn to Mr. Heintzman. 6 Mr. Heintzman seemed to advocate the suggestion that the undertaking is any plan. It is the 7 8 need and rationale. 9 I suggest, Mr. Chairman, that cannot be 10 so. 11 The undertaking must have some content to 12 it, otherwise it boils down to a simple tautology, that 13 the undertaking is whatever approvals this Board awards, and that cannot be so. 14 15 Mr. Heintzman also submitted to you that 16 Hydro could not by its filing of the Update derail the hearing. This was a submission, I think, made by at 17 18 least one other intervenor, and I apologize, I forget exactly who it was, I may come to it later in my notes, 19 20 but this notion that once the hearing is under way, 21 neither the proponent for any other intervenor can stop 22 the hearing. 23 [12:15 p.m.] 24 Mr. Chairman, I think that must be

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fundamentally wrong. We are here under the Act to

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consider	the	propor	nent	's under	rtakin	ng. It	is	not	a
general	commi	ssion	of	inquiry	into	anybod	ly's	and	
everyboo	lv's r	roposa	als.						

right to do.

If this Board loses jurisdiction or if
Ontario Hydro withdraws the undertaking, that's it.
The hearing has no purpose under the Act. It has not
by the simple dropping of the gavel at the outset
become everybody's hearing. We all have the same
procedural rights, we all have the same entitlement to
fairness and natural justice. But if Ontario Hydro has
taken the hearing away, that is something they have the

Mr. Heintzman also said that Ontario

Hydro has not said that it won't take Plan 15. I don't

want to address the Board's powers to order Plan 15,

Mr. Chairman, but let's be clear. Ontario Hydro I

think said initially, we will take any of the three

plans. Had a preferred one but said this is what we

would take.

They have said clearly in their Update they are no longer making any requests for approvals for major new facilities and they are not saying to this Board you can choose between the Update and our other identified alternatives. They just don't want it. In that sense, Mr. Chairman, I say they have

withdrawn the undertaking.

Mr. Heintzman, Mr. Chairman, made some comments on whether it was a 25-year planning exercise or a 5-year planning exercise. I won't repeat my earlier submissions of why I think it has fundamentally changed from 25 years to 5 years, but I urge you to recognize the comments of Mr. Heintzman and Mr. Rodger and some others what was in substance a plea to you, I suggest, not to submit to Hydro's change but to leave the door open for others to present a 25-year plan is pretty good evidence of the extent to which Ontario

Mr. Shepherd in his remarks, Mr.

Chairman, made many observations to you about the responsibilities on the parties and this Board in view of public expectations and time and funds invested. As I indicated earlier, Mr. Chairman, as attractive as that is and as much as we all subscribe to that, unfortunately there are jurisdictional limitations and there is an Act here.

Hydro's Update has changed the nature of the hearing.

I suggest to you that if you agree with my submissions that Ontario Hydro has departed from the appropriate and/or prescribed planning principles and methodologies, it would be a disservice to the public, a disservice to the Act, and a disservice to the

_	investment that people have made in having a proper
2	decision to have the hearing proceed in a context and
3	under circumstances where there is a risk that the
4	outcome will not be a proper one. That I suggest, Mr.
5	Chairman, ought to be the larger concern of the Board.
6	In Mr. Poch's submissions, Mr. Chairman,
7	he said the hearing could continue because the mere
8	fact that Ontario Hydro has changed assumptions amongst
9	the alternatives, if I have his words correctly,
10	doesn't put it off the rails. I said before, Mr.
11	Chairman, that assumes as a proposition, it assumes
12	that Hydro is choosing amongst the alternatives from
13	which it is entitled to choose. For the reasons I

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If that were so, Mr. Chairman, it could come forward with any manner of plan that it chose to and say, here it is. We haven't looked at it and it is our preferred plan and let's proceed.

indicated before, it is not entitled to simultaneously

propose the alternative for the first time and choose

Mr. Poch also submitted to you that this motion was premature. He said he may be inclined to bring a similar one at least with respect to the sufficiency of the environmental assessment after the evidence given by Ontario Hydro as I understood it on

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2	I suggest, Mr. Chairman, that that is not
3	a wise way of proceeding for two reasons. Number one,
4	I have indicated to you in our submission that Hydro
5	hasn't even passed the first threshold and not only is
6	that a precondition, I suggest, which takes away the
7	prematurity argument, I suggest that there is a risk
8	this Board is persuaded that Ontario Hydro hasn't done
9	the preselection of its plan work. There is a risk
10	that by letting the hearing proceed and letting the
11	record be papered after the fact is precisely what the
12	Board has to avoid.

If I can have your indulgence for a moment, Mr. Chairman.

Lastly on the subject of prematurity, Mr. Chairman, and I say this in response to Ontario Hydro's submission as well. For a very deliberate reason, when we brought this motion we did not simply put in a written submission in response but we brought a motion, the proper notice of motion and supporting affidavit of evidence which I have to some extent described to you already.

Ontario Hydro had every opportunity -- I am aware of no reason why it couldn't to present to you evidence in whatever form that the conclusions drawn by

Dr. Yokell in his affidavit about the fundamental
paucity of information and about the fundamental nature
of the change. Ontario Hydro had every opportunity to
meet that case.

As we know from the authorities we have discussed earlier in the hearing, all they have to show is that they have got a prima facie acceptable assessment or that there is some argument that it is not or there is some persuasive view anyway that may it's not a different undertaking and that the inquiry should be held for more evidence. We have given them our evidence. We have given them notice of motion. They haven't responded.

I suggest to you, Mr. Chairman, and as happened - I don't have the cite - there was about two weeks ago a divisional court ruling on another environmental assessment case where a proposal for a clay pit by the Municipality of Metropolitan Toronto was dismissed by the Board for similar reasons that the plan was still in flux and similar matters, and the Board heard that on a motion from one of the intervenors. The proponent did not respond with any evidence that persuaded the Board that the intervenors view was wrong and the motion was granted.

Ontario Hydro just doesn't have the

1	luxury, according to any rules that I am familiar with,
2	of saying, yes the MEA has its evidence on the record
3	and it's fairly conclusive, but we want the opportunity
4	to call evidence in the hearing to persuade you that
5	they're wrong. This was the motion and this was the
6	time to do it.
7	Those are my comments in reply, Mr.
8	Chairman, unless there are any questions.
9	THE CHAIRMAN: Thank you, Mr. Mark.
10	MR. MARK: Mr. Chairman, just before I
11	sit down, you were to have heard from Windsor Utilities
12	Commission. Mr. Edwards, who is the general manager,
13	was here yesterday, could not stay today. I don't act
14	for Windsor Utilities, but Mr. Edwards has asked if I
15	would do him the favour of just stating briefly to the
16	Board what he would have said if he was here. And with
17	your permission, I just would like to do that.
18	THE CHAIRMAN: All right. Is it long?
19	[Laughter]
20	MR. MARK: No. I wouldn't let him.
21	THE CHAIRMAN: I guess I should put on
22	the record that Windsor Utility is not a party to the
23	hearing and has not been granted status us a party.
24	They very vigorously wanted to participate in this and
25	we said that they could, holding in abeyance the issue

- of their status, because that was something that we didn't think we would want to spend any time arguing about under these particular two days.
- MR. MARK: Yes, these submissions are
  under the understanding that the question of status
  and, if that is granted, intervenor funding would be
  deferred.
- 8 The Windsor Utilities Commission, Mr. 9 Chairman, considers that the hearing is no longer relevant to Ontario Hydro's actions; that Ontario Hydro 10 11 proceeded on the basis of the Update to cancel some 12 NUGs projects across the province. Windsor Utilities 13 has a concern because of its particular circumstances 14 in its area that there are issues there that have to be addressed. 15

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Windsor Utilities Commission is concerned about Hydro having accepted fuel substitution and planning to the median as accepted components of the plan without the decision of the Board or any other public input before so doing.

Windsor Utilities is established under special legislation having sole statutory responsibility for supply in Windsor, which is a unique situation amongst the utilities, and therefore has particular issues of concern.

_	The opdate 92 has components not
2	acceptable to Windsor, and the Windsor Utilities
3	Commission submits to the Board that had Update '92
4	been initially filed, intervenor status and perhaps
5	intervenor funding, at least for those issues which are
6	unique to Windsor Utilities Commission, would likely
7	have been sought. And this in itself, Windsor
8	Utilities Commission submits, speaks to the magnitude
9	of the change of the program as perceived by Windsor
. 0	Utilities Commission.
.1	Windsor Utilities Commission submits that
. 2	the subject of the hearing has so substantially changed
.3	that the hearing would have to start over if it 1 not
. 4	terminated; and in the alternative if the hearing
.5	continues, then the panel must find an effective way to
.6	allow the entry of new intervenors including
.7	consideration of funding and recognition of the
.8	interests of parties such as Windsor Utilities
.9	Commission as a new intervenor.
0	Thank you, Mr. Chairman.
1	THE CHAIRMAN: Thank you, Mr. Mark.
2	Mr. Rosenberg, you are next.
3	SUBMISSIONS BY MR. ROSENBERG:
4	Mr. Chairman and Panel Members, you have
5	the CAC's written brief and I won't refer to that. I

1	think it speaks for itself. What I plan to do for the
2	next twenty minutes or so is just discuss what I
3	believe is the only issue. And I have had Mr. Monger
4	hand to the clerk three hand-outs for you.
5	First and last this is a jurisdictional
6	issue which must be answered in jurisdictional terms.
7	For the CAC, Mr. Chairman, the questions are really
8	these: Does Exhibit 452 constitute a new undertaking?
ð	If yes, is this Board seized of it?
10	And there is a second set of questions:
11	Does Exhibit 452 constitute a new environmental
12	assessment? If yes, is this Board seized of it?
13	It's obvious from the prefiled submission
14	of the CAC that the CAC supports the MEA's position
15	that in fact the answer is that Exhibit 452 does
16	constitute a new undertaking. And the answer to the
17	second question is that this Board is not seized of it.
18	Now to review those points, I go right
19	back to Mr. Howard's opening statement. He raised four
20	points and I agree with two of them and two I disagree
21	with. Mr. Howard said that the proponent defines the
22	undertaking. I agree with that.
23	Second Mr. Howard said that the planning
24	framework included flexibility and assigned priorities.

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I agree with that.

I disagree with the next two points an	ıd
that is Mr. Howard said that the undertaking has not	
been changed. The CAC takes a fundamental position	
different to that of Hydro. The CAC states that the	à
undertaking has been changed.	

Number 4, Mr. Howard's fourth point was that this matter is premature. And the CAC disagrees with that at first instance. As a first position we say it is not premature and that is why I say that this is fundamentally a jurisdictional issue which must be answered in jurisdictional terms because the only issue that is conclusive at this point is whether or not 452 is a new undertaking or possibly a new EA.

If it is neither, then I submit it is within the Board's discretion to continue the hearing, to deal with amendments, to deal with adjournments in order to ensure natural justice is met.

Now what I would like to do -- I know that people have gone through this at great length in defining what the undertaking is. In our submission, Mr. Chairman, and Panel Members, it is not difficult. It is quite clear from the Balance of Power document, Exhibit 3, what it is. And if I can just take you quickly through a couple of references, about four or five references, I think it will become obvious that it

1	is not a difficult determination.
2	First, page 1-3. Just to recite, about
3	halfway down the right-hand column, hydro says:
4	"Under the Act, specific matters -
5	those for which approval is requested and
6	required - are identified as the
7	undertaking."
8	In the same chapter, if we move to page
9	1-7, and this is the same chapter or continuation of
10	the logic of 1-3, it says in the little box "Approval
11	Requested", same language as is found in 1-3. There is
12	a box and starting at the bottom of the left-hand
13	column of the box, it says:
14	"Many of the components of the Plan do
15	not require Environmental Assessment
16	approval. The Program Approval requested
17	in this application relates only to
18	certain components of the Plan, including
19	the following"
20	And then its lists what they are. And
21	then it tells you to go to Chapter 19.
22	But before we get to Chapter 19 because
23	you have seen 19 and 18 too, if you look at page 17-12,
24	which has not been referred to you today in argument,
25	it's clear that the approvals requested from Hydro's

_	perspective are in fact the undertaking. And then
2	Hydro on the left-hand column of page 17-12 says "Plans
3	are Robust and Resilient":
4	"The Demand/Supply Plans are designed
5	to accommodate many uncertainties without
6	adverse impact on electricity service.
7	In this regard, all three Demand/Supply
8	Plans are robust and resilient. They
9	provide considerable flexibility and are
10	expected to meet a range of reasonable
11	future events while continuing to:
12	- supply reliable electricity service;
.3	- maintain low customer cost;
4	- meet current environmental
.5	regulatory requirements; and
. 6	- achieve high performance with regard
.7	to worker and public safety.
.8	"All three Demand/Supply Plans contain
.9	a mix of fossil and nuclear options
20	which, within reasonable limits, offer
21	flexibility to accommodate the following
22	uncertainties:
!3	"Variations in load growth outside the
24	bandwidth forecasts, development of new
25	options, and more stringent environmental

1	and safety requirements."
2	[12:35 p.m.]
3	If I can just refer you now to page 18-2.
4	The last sentence in the left-hand
5	column:
6	"If the actual load trend is below the
7	upper forecast, the project commitments
8	will be delayed to the "just-in-time"
9	requirement."
10	So, the logic is clear, Hydro says their
11	plan is flexible, it contains nuclear options. If
12	there is any change in the forecast, they will delay to
13	a "just-in-time" basis to the bringing on of that
14	option.
15	Now let's look in Exhibit 452. 452, in
16	our submission, is clearly a different document and a
17	different undertaking.
18	On page 33 Hydro makes it quite clear
19	that they are taking the request for fossil and nuclear
20	approvals off the table. They are also no longer
21	planning to the upper forecast but to the median
22	forecast, and that's a fundamental change from Exhibit
23	3.
24	In simple terms, the elastic has snapped.
25	Exhibit 3 is not flexible or robust enough to

1	accommodate	Exhibit	452.	That's	our	point	and	we	take
2	it strictly	from the	langu	age.					

They say time and time again in Exhibit 3 that their plan is robust and resilient enough to accommodate all uncertainties as they see it. In fact, at page 17-12 they define the flexibility and the flexibility includes, as they say: All three demand/supply plans contain a mix of fossil and nuclear options. Well in fact, Exhibit 452 does not. And further, they have narrowed of range of options.

So what is the consequence of that? And that is the important point for the CAC. Many intervenors have talked about this issue but in our view the consequence is this: We have to look at the Act and some authorities to understand the point.

The act has three parts to it. The process under the Act contemplates a phase of review which in and of itself can complete the process which is the ministerial review and decision-making, there may be a referral to the Board, and if there is a referral to the Board there is a third part which is the subsequent ministerial review.

The reason the CAC says to you this morning that you cannot be seized of the matter if it's a new undertaking is because in jurisdictional terms,

L	Mr. Chairman and Panel Members, you are usurping the
2	role of the Minister. The scheme of the Act is clear
3	that the Minister will decide what to do at first
1	instance with a new undertaking.

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If I can turn your attention to the handouts that I have provided you. I have given you a copy of the Ontario Hydro Southwestern Ontario Bulk Electricity Undertaking, and the passages I was going to rely on have been referred to you.

My comment to you about the passages at page 274 and 275, and I will just note them for you.

At page 274, it's the first paragraph, it says:

"In our view, the Act is to be interpreted to maintain a fluid or dynamic environmental assessment process which includes the public hearing by the Joint Board. The process commences with an idea of the proponent and is continued by a description of the purpose of the proposed undertaking. The purpose may change as the assessment process proceeds through the various steps, but it is not a matter left solely to the discretion of the proponent. We have observed this evolution of purpose with the subject

Т	undertaking."
2	Then I refer you to page 275, the second
3	and third paragraphs which Mr. Mark read. The point
4	this case is that they are bald statements, there is no
5	statutory analysis or even issues analysis for the
6	panel to come to that conclusion. But they do conclude
7	in the second paragraph that it is really a matter of
8	degree as to whether or not the undertaking has
9	changed.
10	But in our submission, Mr. Chairman and
11	panel members, it's not a matter of degree, it's a
12	jurisdictional issue which goes to the heart of what
13	the power of this Board is and how you came to have
14	this issue before you.
15	I have dug up some excerpts from text
16	books on administrative law, and I think it's helpful
17	just to spend two or three minutes looking at what
18	these texts say.
19	The first I would like to refer to is the
20	Administrative Law and Practice, Robert Reid and Hillel
21	David. And at page 207 the learned authors state:
22	"Jurisdictional error can be
23	substantive or procedural, and may be
24	constitutionally grounded. It must be a
25	matter of real substance, and not merely

1	minutiae of technicality."
2	On the next page they set what I believe
3	is the foundation for this argument, and that is:
4	"There may be conditions precedent to
5	a tribunal's jurisdiction."
6	That's the first sentence on the first
7	full paragraph, and then the last sentence of that
8	paragraph says:
9	"A tribunal may not confer
10	jurisdiction upon itself by
11	misinterpreting its authorizing
12	legislation or agreement."
13	Now, for a fuller analysis of those
14	issues I turn to the Principles of Administrative Law
15	by Jones and de Villars, and in particular page 94.
16	Part 2 the authors say:
17	""Jurisdiction" is one of the most
18	elusive concepts in Administrative Law."
19	They go on to cite Lord Reid's decision
20	in the Anisminic case.
21	Lord Reid stated:
22	"It has sometimes been said that it is
23	only where a tribunal acts without
24	jurisdiction that its decision a
25	nullity."

1	And he goes on to say:
2	"and I have come to the conclusion
3	that it is better not to use the term
4	except in the narrow and original sense
5	of the tribunal being entitled to enter
6	on the inquiry in question."
7	So in case, are you entitled to continue
8	on with the inquiry given Exhibit 452.
9	And I turn you to part 6 of this handout,
10	Defects in Acquiring Jurisdiction. Here the authors
11	put what I believe is the question before you:
12	"Adopting Lord Reid's narrow meaning
13	of jurisdiction, one must focus on the
14	acquisition of the delegates'
15	jurisdiction to do the particular act in
16	question. This requires an examination
17	of the statute to determine: (a)
18	Precisely what sort of thing the delegate
19	is authorized to do, outside of which his
20	actions are clearly ultra vires: (b)
21	That the delegate has been validly
22	constituted and (c) whether the
23	delegate has complied with all statutory
24	requirements, such as advertising or
25	giving notices"

1	In our submission, it's subsection (A),
2	precisely what sort of thing the delegate is authorized
3	to do outside of which his actions are clearly ultra
4	vires.
5	THE CHAIRMAN: Sorry, I have lost you.
6	MR. ROSENBERG: I am on page 101, which
7	doesn't have a page number on it.
8	THE CHAIRMAN: I have got it, thank you.
9	MR. ROSENBERG: The second sentence:
10	This requires an examination of the statute to
11	determine (A) precisely what sort of thing the delegate
12	is authorized to do outside of which his actions are
13	clearly ultra vires.
14	In our submission, Mr. Chairman and Panel
15	Members, that is the issue here today.
16	If we turn to the last page of this
17	handout, page 111, the author has described in the
18	first paragraph, Part 5, Preliminary or Collateral
19	Matters.
20	"Sometimes, legislation only delegates
21	powers to an administrator in conditional
22	terms: If a certain state of affairs
23	exist, then, but only then, does the
24	administrator have authority to act or
25	make a decision."

1	And the last sentence:
2	"If so, a defect or error in such a
3	preliminary or collateral matter will
4	prevent the delegate from having
5	jurisdiction."
6	There are other quotations that might be
7	relevant, but I believe that sets the scene. And the
8	consequence is that in fact if you have taken on
9	jurisdiction where you do not have that jurisdiction,
10	all your actions are void and it is an invitation for
11	results, it's an invitation for anybody at any point in
12	the hearing, or at the end of the hearing, if they
13	don't like what happens, to go back to this point and
14	say, the whole process was a nullity and we have to
15	start over.
16	And I believe, in our submission, Mr.
L7	Chairman and Panel Members, that's what you are faced
18	with today. It's not a question of would we act
L9	differently if Hydro had changed the plan in a
20	different matter. The question is: What is 452 and if
21	it's a new undertaking you don't have jurisdiction.
22	If I can turn to the Act and begin with
23	Section 17. Now on a plain reading of the Act, the CAC
24	takes the position that Section 17 applies.
25	"Where a proponent of an undertaking

1	proposes to make a change in the
2	undertaking"
3	And it is our submission that Hydro has
4	clearly made such a change.
5	"(a) Before the Minister has given
6	approval to proceed with the
7	undertaking"
8	Which is in fact the case here. And then
9	the troublesome sentence:
0	"that does not conform to the
1	environmental assessment of the
2	undertaking as accepted by the
3	Minister"
4	Well, clearly in this case we don't have
5	that, but it doesn't do an injustice to the words to
6	say that this case fits into that section because in
7	fact the second part is a negative, so that in this
8	case the minister has not given approval to proceed and
9	this change does not confirm to an environmental
0	assessment of the undertaking as accepted by the
1	minister.
2	Then we go to the bottom:
3	"This act applies to the proposal to
4	make the change in the undertaking as
5	though the proposed change were itself an

_	undertaking to which this Act applies."
2	Now, if the Panel were to find that
3	section doesn't apply
4	THE CHAIRMAN: Hold it a minute.
5	How do we find that this change in the
6	undertaking does not conform to the environmental
7	assessment of the undertaking as accepted by the
8	minister? How do we find that?
9	MR. ROSENBERG: You cannot find that.
L 0	THE CHAIRMAN: I'm sorry, I don't see
1	where Section 17 helps us.
.2	MR. ROSENBERG: Well, Mr. Chairman,
. 3	Section 17 in our submission applies. There is no
. 4	other section in the act that comes close to this
.5	subject. And if it doesn't apply, and
.6	THE CHAIRMAN: I hesitate to enter into
.7	this, but isn't Section 17 designed to deal with the
.8	situation after this Board hearing has been completed
.9	and approvals have been given on conditions and so on,
0	and then there comes along a change and the test is, i
1	the change in conformity or not?
2	It does contemplate changes as long as
13	they conform with the assessment.
4	MS. PATTERSON: I just want to add
5	something there.

1	I think that this section does deal with
2	an undertaking where something has been approved, or
3	there has been an acceptance or an approval, one or the
4	other, not before the time that an acceptance has been
5	given.

MR. ROSENBERG: I agree with that. There is no reference to whether or not the Board has been involved in the process.

If this section doesn't apply, there is no other section that directly does apply. And if we are then to divine what should apply, the first place to start, in our submission, is Section 17.

Section 17 suggests very strongly that you treat a change to an undertaking as a new undertaking. And if that's the case, one should ask why. And the answer, simply put, is the logic of the Act. That there are decisions which the Minister must make prior to this Board receiving jurisdiction to deal with the matter.

If you determine Exhibit 452 is a new undertaking, or a new environmental assessment, then the scheme of the Act is, as contemplated under Section 17, that you go back to the beginning under Section 7 where it says where an environmental assessment of an undertaking is submitted by a proponent to the

- 1 Minister, the Minister then shall do a number of 2 things.
- In our submission, most of the

  intervenors and people who have submitted to you to

  date on this issue have not dealt with that issue. The

  issue is: Who decides whether or not the undertaking,

  the new undertaking or new environmental assessment

  goes forward to a hearing, and that's the Minister, not

  this Board.
  - THE CHAIRMAN: But isn't it so that there is nowhere in the statute any provision that deals with changes in the undertaking in the course of the process that we are now engaged in.
- MR. ROSENBERG: If Section 17 does not apply, that's correct.

perhaps — and as I say this is the first time I have seen it, it's obviously not an easy section to read—but does it not deal with what happens either after this hearing, or as Mr. Patterson says, after some approval or acceptance has been made? But doesn't it give at least some comfort to those who want to continue the hearing because it does, perhaps by implication, imply that there can be changes provided they conform with the environmental assessment of the

1 undertaking is accepted.

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- 2 MR. ROSENBERG: I accept that, Mr.
- 3 Chairman, that's one alternative.

5 Minister -- that Hydro is directed by this panel to send Exhibit 452 to the Minister as a new undertaking 6 7 or a new environmental assessment. The Minister could 8 decide in order to save the record in this hearing, to 9 order this Board to continue as if it was always part 10 of the original undertaking. The Minister could decide under Section 9 or 10 or Section 11 to do something 11 else, to order research, or to delegate a more

Let's take the position that the

14 many things and it is for the Minister to decide. It's not for this Panel to decide, because in the words of 15 16 de Villars and Jones, it's a preliminary question. It

restricted mandate to this Board. The Minister can do

defines this Board's very jurisdiction.

The only help I have been able to find out of the statute on the question is Section 17.

THE CHAIRMAN: Excuse me, just give me that quote from de Villars again, please? Is that the one on page 94?

MR. ROSENBERG: What I am relying on, Mr. Chairman, is 94 sets the question, the narrow question, and then if you turn to Defects in Acquiring

1	Julisdiction, which has not got a page number, but the
2	6 on it, it says:
3	"Adopting Lord Reid's narrow meaning
4	of jurisdiction, one must focus on the
5	acquisition of the delegate's
6	jurisdiction to do the particular act in
7	question. This requires an examination
8	of the statute to determine: (a)
9	Precisely what sort of thing the delegate
10	is authorized to do, outside of which his
11	actions are clearly ultra vires."
12	In our submission, Mr. Chairman, you are
13	a delegate, or a sub delegate of the Minister. The
14	Minister under Section 12 delegates to you precisely in
15	Section 12 sub 2(D), whether approval to proceed with
16	the undertaking in respect of which the environmental
17	assessment was submitted should or should not be given.
18	They use in paragraph 2(D) definite
19	article "the"; it's not an indefinite article. An
20	undertaking or an environmental assessment, but a very
21	precise defining article, "the" undertaking. The
22	undertaking you received was Exhibit 3.
23	Exhibit 452 is either a new undertaking
24	or a new environmental assessment.
25	If it is one of those two things, then it

If it is one of those two things, then it

1	is for the Minister to decide what exactly the powers
2	are of this Board to deal with that undertaking or that
3	environmental assessment.

Even a cursory reading of Section 7, 8, 9, 10 and 11 of the Act will establish that the Minister has very wide powers to determine what he may 6 do or she may do with that undertaking and that 8 environmental assessment, including hold a hearing, holding a scoped hearing, approving, asking for amendment of the environmental assessment.

[12:55 p.m.]

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So the question becomes not whether it's good or bad what Hydro has done, not whether it has shrunk the undertaking or expanded it, and not the natural justice points because those natural justice points can be cured by this panel throughout the hearing. The question is: How is it that you can now be seized of Exhibit 452 and the questions which it asks?

And the Consumers Association of Canada does not wish to stop this process for the sake of stopping it. The question is how does the Board proceed?

In our submission, Mr. Chairman and Panel Members, if you were to find it is a new undertaking or

- 1 a new environmental assessment, you cannot proceed.
- You don't have the power to proceed. Hydro would have 2 to go back to the Minister, resubmit Exhibit 452 to the 3
- 4 Minister, and then ask the Minister to review it.

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5 Now, clearly because of the importance of 6 this proceeding, the magnitude of this environmental assessment creative minds should be put to the test to 7 see how we can save the record that we have to date.

> But if you don't embark on that journey, you are at risk from this day forward for every intervenor who does not like the result during or at the end of this case of coming back to you and ultimately to the Divisional Court and thereafter to the Appeal Courts and saying, the entire procedure was void; there is no way it could be cured; and it doesn't matter what steps we took after the fact because they are irrelevant.

Now I don't wish to go into a Divisional Court recitation of administrative law but that is the law as I understand it. And that is why Hydro has put you at great risk, put this proceeding at great risk, and that's why I disagree with Mr. Howard's point.

Mr. Howard said this is not a change to the undertaking and we say it is and we say it's a premature. All of the natural justice questions and

1 scoping questions I agree are premature. The fundamental jurisdiction point is not premature. You 2 have to decide it because if you don't you will be 3 4 faced with it every day thereafter. 5 Now what is the test that you must apply? I think the question or I submit the question is this. 6 7 It's not too difficult: If you are the Minister -- I will be two minutes, Mr. Chairman. I am going to 8 9 finish on this point. 10 THE CHAIRMAN: All right. 11 MR. ROSENBERG: Two minutes. 12 If you were the Minister and what was 13 placed in front of you was Exhibit 3 and Exhibit 452 14 and you were asked a question: Are these the same? Is 15 it the same undertaking? Is it the same plan? And you 16 were reasonably and fairly informed... 17 THE CHAIRMAN: The question is that's not 18 that you gave three questions. And the real question is: Was it the same undertaking. 19 20 MR. ROSENBERG: Is it the same 21 undertaking? 22 THE CHAIRMAN: In your submission. 23 MR. ROSENBERG: In our submission, the 24 Minister has asked: Are these the same undertakings?

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A reasonable person would say no and the result -- a

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1	reasonable Minister, whether you take an objective or
2	subjective test - a reasonable Minister would say no,
3	Mr. Chairman, and the consequences of that are that
4	this panel doesn't have jurisdiction because then there
5	is a whole series of questions that have to be asked.
6	If they are not the same, so what. Well, those are
7	questions for the Minister and not for this panel.
8	In conclusion, we therefore submit that,
9	first, the Board does not have jurisdiction to deal
10	with Exhibit 452 and Hydro for the time being in this
11	hearing as it is at an end until 452 is sent off to the
12	Minister for Minister's consideration. And it's our
13	submission that the Minister could save this record by
14	just making it a continuation, but that's a question
15	for the Minister.
16	The alternative is that if the Board
17	finds that they don't have all the jurisdictional facts
18	to make this decision, they can adjourn this mustice

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to make this decision, they can adjourn this question to the end of Hydro's case and then decide. I submit that you do have all the jurisdictional facts you need. That's 452 and Exhibit 3.

And, finally, the second alternative is that if the Board is of the view that it is not a new undertaking and it's not a new environmental assessment, then the CAC requests that, similar to Mr.

1	Mark's request, that all panels be capable of being
2	recalled and for our case that would be Panels 1, 3,
3	and 4 that we would ask could be recalled.

I thought -- I believe it was Mr.

Kelsey's point was very persuasive that if nothing else
the Board constitute a separate panel or ask Hydro to

constitute a separate panel on Exhibit 452.

THE CHAIRMAN: Well, it would be difficult not to accept that if we don't have jurisdiction we shouldn't be here, would be one way of curing it to say, all right, we will just reject 452 and continue to deal with the undertaking as it was originally put in and complete the hearings on that basis?

MR. ROSENBERG: I think the answer is yes. Well, it's not your determination; it's the proponent's determination.

THE CHAIRMAN: I realize the proponent then might counter by saying well, if that's the case we are going home and we are withdrawing the whole thing. And then that would be certainly the end of the hearing.

MR. ROSENBERG: If Hydro withdrew Exhibit 452 and relied on Exhibit 3, then this is a non-issue and everything else raised, Mr. Chairman, in the CAC's

1	view is a natural justice question which you can cure
2	through appropriate adjournments and information. But
3	if Hydro withdraws Exhibit 452 and relies solely on
4	Exhibit 3, then you are still seized of this matter.

not going to consider 452, we are just going to continue with the undertaking as originally submitted to us by the Minister.

MR. ROSENBERG: I don't think you can do that, Mr. Chairman, because that's the proponent's determination. The proponent scopes their own undertaking.

THE CHAIRMAN: Well, maybe they have the let the genie out of the bottle by defining the undertaking, and it may be that if someone — someone I think said it was immutable or something like that under the process and maybe they can't change that because that's really what you are saying.

MR. ROSENBERG: No, I am not. I know of no case except -- well, I know of no case where one or more of the parties couldn't end the proceeding. Hydro cannot be conclusively forced to carry on with this case. They can withdraw it or in this case they have withdrawn their first undertaking, put the new undertaking before you. And I raised the simple

1	question: Well, how is this Board seized of that?
2	DR. CONNELL: Mr. Rosenberg, what if
3	Hydro does proceed with the original undertaking but
4	another party introduces 452 as an alternative method
5	for carrying out the undertaking? [Laughter]
6	MR. ROSENBERG: I will answer it like a
7	lawyer. That wouldn't be a fundamental jurisdictional
8	point and the Board would deal with it during the
9	course of the hearing. That wouldn't end the hearing
10	in my submission. It might end the hearing. But it
11	certainly on its own force wouldn't. And then it
12	becomes a question of whether it's an alternative or
13	whether as Mr. Dahme said in his remarks very briefly
14	yesterday, whether the proponent of Exhibit 452 then
15	would have the burden, very high burden of proof, would
16	have to submit a great deal of evidence to this Board
17	to establish it as an alternative method to the Plan.
18	But faced with what we have, which is
19	Exhibit 452, I ask the simple question: How is it that
20	this Board deals with it? And I can't find in my
21	reading of the Act any way for the Board to deal with
22	it if it is a new undertaking or a new environmental
23	assessment.

And if I can just refer the Board - I don't believe I did - Section 7(3) deals with new

1	environmental assessments. And it says:
2	"A proponent may withdraw or amend an
3	environmental assessment at any time
4	prior to the day on which notice is given
5	under subsection (1) and thereafter may
6	withdraw or amend an environmental
7	assessment subject to such terms and
8	conditions as the Minister may by order
9	impose."
10	And the importance of that section is I
11	believe that it deals clearly with the environmental
12	assessment issue and unfortunately there is not an
13	equivalent section for undertakings. And if you read
14	the intent of Section 17 with the intent of Section
15	7(3), it is our respectful and highly compelling
16	submission that undertakings should be dealt with in
17	the same way. [Laughter]
18	THE CHAIRMAN: That's the first time I
19	ever heard that. [Laughter].
20	DR. CONNELL: Mr. Rosenberg, I'm not
21	clear why you are so confident that further evidence
22	from Hydro will not help to illuminate the
23	jurisdictional question.
24	MR. ROSENBERG: Dr. Connell, from a legal
25	position. If the undertaking has changed, it doesn't

1	matter whether or not it will illuminate Hydro's
2	actions or better explain them or explicate them.
3	That's not the question. The point is that this Board
4	wouldn't have the power to do anything with it, only
5	the Minister would because you don't acquire your
6	jurisdiction merely by the filing of the document.
7	It's by the reference from the Minister.
8	DR. CONNELL: Well, surely you must
9	realize that what I am exploring is further
10	illumination of the question as to whether the
11	undertaking has changed.
12	MR. ROSENBERG: It might. Our submission
13	would be that the only thing that you need are these
14	two documents. There is a passage if you just bear
15	with me for a moment. I did not put this in the
16	material but there is case law I believe to support
17	your position. And if I can read from it, it is a
18	quote from De Smith on Administrative Law and the
19	author states that:
20	No satisfactory test has ever been
21	formulated for distinguishing findings
22	which go to jurisdiction from findings
23	which go to the merits. And in some
24	cases the courts impressed by logical

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difficulties have appeared to ignore the

1	distinction altogether.
2	Then the authors go on in following that
3	saying: What evidence should the court rely on? And
4	they say how can one demonstrate and this is the
5	author speaking at page 115
6	THE CHAIRMAN: Which edition by the way?
7	Sorry to interrupt.
8	MR. ROSENBERG: It doesn't have an
9	edition. I guess it's 1985, Mr. Chairman, at page 115.
10	If this is helpful, Dr. Connell, they
11	say:
12	How can one demonstrate a preliminary
13	or a collateral jurisdictional defect?
14	In some cases it may be possible to
15	demonstrate the defect from the face of
16	the record of the proceedings. But
17	unlike the case involving intra
18	jurisdictional errors of law, a person
19	alleging a jurisdictional error is not
20	restricted to the record but can lead any
21	relevant evidence, usually in the form of
22	affidavits, to cast light on the defect.
23	Now what I take from the author's comment
24	is that we can rely on Mr. Mark's affidavit or we could
25	rely on further evidence that Hydro presents. But as a

- first position, the CAC says you have all the information you need now. You have Exhibit 452 and Exhibit 3.
- If you continue with the hearing, the
  risk that you run is that nothing can cure the defect.

  The hearing is void from that point forward and at any
  point in the future an intervenor could raise that
  point.

So we submit that the more risk averse position is to stop it now, redirect the matter to the Minister and let the Minister decide because you don't require any further information to determine whether or not it is a new undertaking or a new environmental assessment. What more could Hydro put before us that will clearly determine that issue? And I can't think of any additional evidence that would make it more clear.

They will explain it at a greater level of detail but on first principles, I go back to my proposition. A minister looking at these at first instance would determine that they are different. They are different undertakings and consequentially different environmental assessments are required.

A greater legal of detail doesn't cure that defect, but from my understanding -- I'm sorry I

1 didn't reproduce that. The author suggests that yes, you could continue to gather more evidence. Once again 2 3 I ask how that would be helpful. You read the undertaking Exhibit 3 and you read the undertaking 452 4 5 and they are different. 6 And what we described it as the elastic having snapped. At page 17-12 Hydro says the plan is 7 robust and resilient but it's not neverending and at 8 some point it snapped and Exhibit 452 is beyond the 9 10 contemplation of Exhibit 3. 11 So I conclude with that if you find it's 12 a new undertaking or a new environmental assessment as a matter of jurisdiction and as matter of law, you have 13 14 no further jurisdiction to deal with this matter. 15 DR. CONNELL: Thank you. Just let me 16 correct your language. I don't have a position. I am 17 just asking questions. 18 MR. ROSENBERG: Yes. 19 THE CHAIRMAN: I think we better now 20 adjourn until two-thirty. 21 THE REGISTRAR: Please come to order. This hearing will adjourn until two-thirty. 22 23 ---Recess at 1:13 p.m.

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THE REGISTRAR: Please come to order.

---On resuming at 2:32 p.m.

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1 This hearing is again in session. Be seated, please.

THE CHAIRMAN: Mr. Mark Anshan, is he

here?

## SUBMISSIONS BY MR. ANSHAN:

MR. ANSHAN: Mr. Chairman, members of the board, my name is Mark anshan and I represent CAESCO the Canadian Association of Energy Service Companies, which is a part-time intervenor to these hearings and has not participated up to this point in time.

I like to just briefly give you a brief overview of what CAESCO is. CAESCO is the umbrella organization of the energy performance contracting industry. It's a nonprofit Canadian association representing the energy services companies and associated organizations in developing and attaining national and provincial energy efficiency, conservation and alternative energy objectives in an environmentally responsible manner. Presently CAESCO is working with Ontario Hydro and the federal government on a number of DSM initiatives.

Its membership has as particular expertise in DSM energy efficiency measures in buildings in the commercial, industrial health and government sectors and thus our interest in these hearings.

1	Update '92 places greater emphasis, as you
2	well know, on DSM initiatives. Ontario Hydro is
3.	forecasting savings of 9,860 megawatts as compared to
4	the original forecast of 5,570 in the DSP.
5	CAESCO is now particularly interested in
6	participating in regard to this issue of DSM and
7	examining the evidence upon which this new forecast of
8	energy savings from DSM measures will be achieved. And
9	we intend, if possible, to lead evidence of energy
10	performance contracting and how it can contribute to
11	DSM initiatives.
12	CAESCO will also want to examine in
13	detail the extent to which EPC, energy performance
14	contracting, is part of the new forecast of energy
15	savings and the conservation programs being planned by
16	Ontario Hydro to reduce demand.
17	Finally, as a result of this
18	participation, CAESCO will also be seeking, at the
19	appropriate time, costs incurred with respect to our
20	participation, either at the end of the hearings or
21	seek interim costs if available or alternatively if the
22	Board determines it is appropriate to re-open the
23	intervenor funding process, as suggested yesterday, by
24	Mr. Heintzman, we will apply for such funding at that
25	time. And for those comments I thank the Board

1	THE CHAIRMAN: Thank you.
2	Mrs. Mackesy, do you have any
3	submissions?
4	SUBMISSION BY MRS. MACKESY:
5	Mr. Chairman, I have no changes to make
6	in my written submissions, so I won't repeat that but I
7	would like to add two more points arising out of what I
8	heard yesterday. And it would be more convenient for
9	me to do that now than to wait until possibly tomorrow.
10	THE CHAIRMAN: Yes.
11	MRS. MACKESY: Thank you.
12	First I would like to put on the record a
13	response to IPPSO's remarks regarding the public
14	interest and the expectations of the man in the street.
15	
	The person in the street has generally received
16	electricity service without depending fully on a
17	reactor or generator in his or her basement or on the
18	back porch or in the company parking lot. And he or
19	she has often received it without a transmission line
20	on their property or in close proximity to such a line.
21	But because that person in the street has
22	received electricity service without the cost of being
23	a host of such facilities, other people have had to pay
24	the cost of accepting such facilities in their

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environment. The environment assessment and hearing

1	process should give those people who have paid or will
2	pay the cost of hosting such facilities the opportunity
3	to closely examine the planning for such facilities and
4	to present alternatives. I would respectfully suggest
5	that it is time for the person in the street who has
6	escaped such facilities to pay a larger share of the
7	cost of filling his or her electricity demands.
8	My second additional point relates to
9	notice. I would just like to remind the Board of the
10	concern I raised during Panel 6 scoping session and the
11	Panel 7 motion on transmission that the current notice
12	in my opinion unfairly makes a few areas on the notice
13	maps sitting ducks for approval at sites and routes at
14	later hearings.
15	Those are my remarks.
16	THE CHAIRMAN: Thank you, Mrs. Mackesy.
17	MRS. MACKESY: Thank you.
18	THE CHAIRMAN: Dr. Boldrini?
19	You are Mr. Kalevar; is that right?
20	MR. KALEVAR: You certainly recognized me
21	correctly, sir.
22	THE CHAIRMAN: But I called for Dr.
23	Boldrini. I just want to make sure he is not here. He
24	was next.

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MR. KALEVAR: That is correct. And he

1 phoned me last night and communicated to me that he 2 cannot make it today because of his wife's condition 3 and he has asked me to also represent the view of the 4 Ecosystems Group. 5 THE CHAIRMAN: And you are a participant 6 in this hearing; is that correct? 7 MR. KALEVAR: That is correct. 8 THE CHAIRMAN: And I think it has been 9 explained to you that technically as not being a party 10 and not having put in a statement we wouldn't normally 11 hear from participants, but we are prepared to hear 12 from you because we understand you are not going to 13 take a long time; is that correct? 14 MR. KALEVAR: Having heard some of the 15 submissions I would say I will be short. 16 THE CHAIRMAN: Thank you. 17 [2:40 p.m.] 18 SUBMISSIONS BY MR. KALEVAR: 19 Firstly, I should point out that I am 20 also a member of the Ecosystems Group, so in that sense 21 perhaps you could consider me as a party. 22 The specific request that Dr. Boldrini 23 made to me last night was to pass on the message that 24 the Ecosystems Group supports the position taken by the MEA. And of course he gave me the liberty to present

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my view as a minority report in the way I see fit. I
said that will be just fine. So, if you like, a
minority report from the Ecosystems Group.

I am an electrical engineer and I was the secretary of the Ontario Coalition for Energy Planning before the Porter Commission, and I was perhaps Ontario's first citizen to make a brief before the Ontario Energy Board regarding these matters. And my history goes back before Energy Probe because I used to criticize Pollution Probe for nothing doing anything on energy.

So bear with me. I am, so to say, Joe

Public, who has not followed all the legal

technicalities. Thanks for that. I heard enough of it

the last two days. And I would like to share some

views.

About a month ago I had an opportunity to talk in a public setting with a Minister, Ruth Greer, in Pickering, and there it was suggested that Toronto is the waste capital of Ontario and North America is the wasteful continent of the world, and the resources consumed by North Americans proved that. Six per cent of the population consume about 50 per cent of the world's resources. And Ontario's per capita energy consumption is amongst the highest in North America.

1	So the question must be asked: Why are
2	we faced with these expansion decisions again?
3	There are better alternatives like
4	conservation, energy performance contracting you just
5	heard, or energy efficiency. And I suggest that the
6	exhibits presented by Ontario Hydro before you have not
7	sufficiently looked at them carefully.
8	So, if we were to redraw the map, I would
9	like a redrawing of the map in this context.
10	I also come from a culture where long
11	term consequences are given a lot more weight than
12	here, perhaps not as much of the native people of
13	Canada would do, but certainly we are told that you
14	should at least think of your grandchildren, and
15	talking to native people they you should at least think
16	of the seventh generation.
17	So, a 25-year plan to me again appears to
18	be not a long term, but really a generational plan,
19	because environmental consequences go beyond a
20	generation.
21	Now, having said that, let me again
22	stress that that is something, again in the case of
23	redrawing the maps, I would request that those
24	parameters be extended.

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Now, coming back, I can't escape that

1	word, undertaking, coming back to the undertakings that
2	we have been talking about, it appears to me that
3	Ontario Hydro's strategy thinkers have pulled an
4	expedient step on you, expedient in view of the changed
5	realities at Queen's Park.

I think the hop, skip and jump that they have chosen to perform in terms of the process that they should have followed reflects perhaps on their concern that ministerial review of nuclear and fossil fuel generation will perhaps draw an adverse inference.

It is conceivable that if somebody hops, skips and jumps, that they may slip and fall.

I suggest it is about time that you make the decision that what Ontario Hydro has done should fall in the lap of the Minister which they have, in effect, circumvented by coming to you directly, or perhaps by narrowing the scope of the hearings, later on the Minister may not even have the opportunity to make a finding or make a decision regarding your findings on the nuclear and fossil fuel generation.

It is conceivable, guessing I am, that this will save some embarrassment to the next Government of Ontario who may be in favour of such generation.

So, I think I find in these days of

1	global warming the continued expansion of Ontario
2	Hydro, when Ontarians enjoy one of the highest per
3	capital consumptions of energy, totally unnecessary.
4	Even in this room, Mr. Chairman, if you
5	count the number of tube lightings that are there,
6	there are 36 of them, each one has I see four tubes,
7	that's 144 tubes for an audience of less than 72.
8	Why do we need two tubes per person in a
9	hall? And where are the switches for them. I was
10	darned pressed to look for a switch here. I wouldn't
11	know which column it is hidden in.
12	The Ontario Building Code doesn't require
13	any limits on how much of lights or things like that
14	can be controlled by a switch. I think there is a need
15	for that.
16	I think conservation must be taken more
17	seriously than it has been.
18	And with that, my only submission is, I
19	think in view of what I have heard, it appears that
20	there are a lot more lawyers in the room than
21	engineers, and this is an engineering hearing as far as
22	I know. That says something about how legalized a
23	society we are. Be as it may, since it's a
24	jurisdictional question, perhaps it's proper. But I
25	think my recommendation to you and your concerns would

1	be that Exhibit 452 certainly should fall in the lap of
2	the Minister, and let him decide what he wants to do
3	with it. He may refer it back to you to save the
4	record, as they say. And the rest of the hearings
5	certainly should proceed, perhaps now that we have the
6	opportunity to expanding these concerns to a longer
7	term than 25 years, at least from the environmental
8	consequences point of view, and a higher emphasis on
9	conservation and energy efficiency.
10	Having said that, I would like to say
11	that we should not allow strategy thinkers at Ontario
1.2	Hydro to basically side-step the political process
L3	established by the Environmental Assessment Act.
L 4	I hope it was not deliberate, but what is
1.5	it that the strategy thinkers do that is not
16	deliberate.
.7	Thank you very much.
.8	THE CHAIRMAN: Thank you.
.9	Before I call on Mr. Moran, is there
20	anybody I have forgotten about?
21	Mr. Moran?
22	MR. MORAN: Thank you, Mr. Chairman
23	SUBMISSIONS BY MR. MORAN:
24	Having had the benefit of listening to
15	the whole range of submissions to this point, I am

reminded of the story of the people in the dark who
were surrounding an elephant and they are all trying to
describe the elephant based on the part of the elephant
they happened to be touching.

I am struck by the number of elements that seem to be consistent at least through a number of people's submissions, and I thought I would start off with indicating at this point the points of agreement that we would endorse.

The first point that we would agree with is that this hearing is definitely about planning, and I think the majority of the intervenors have agreed with that.

The second point is that we are definitely talking about two time periods in this hearing. We are talking about a 25-year planning horizon and we are also talking about a 5-year action plan period.

And thirdly, I endorse very strongly the sentiment that was espoused by Mr. Shepherd. This a seminal debate and --

THE CHAIRMAN: I am sorry, it's a what?

MR. MORAN: A seminal debate and a

complex one, and one that is important to everybody in

Ontario. His proposition that the planning process has

1 been brought into the realm of the undertaking is one 2 that we agree with. One of the major purposes behind the 3 4 referral to the Board of this undertaking was to have a 5 complete assessment of all of the options. 6 Having said that then, I believe there is 7 a way to pull together a lot of what parties who appear at least to be in opposition, I believe there is a way 8 to pull a lot of what they have said together, and the 9 10 starting point for me is this question: What can the 11 Board actually approve? 12 The Act is very clear on this. The 13 approval the Board gives is permission to proceed with 14 an undertaking. 15 We agree with the proposition that the 16 proponent defines the undertaking. There are some 17 limitations on that, however. 18 The undertaking is described in a particular way, but the Act requires a proponent to 19 20 describe alternative methods of carrying out the 21 undertaking. 22 Clearly, through all of those alternative 23 methods we are still talking about the same undertaking. The only thing that's changed is the way 24

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you are actually going to carry that out. And it is

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certainly open and in fact required of the proponent to	0
describe to it's best ability what it believes are	
alternative methods	

However, that's not the end of the process, in my submission. It's also equally open to intervenors to describe alternative methods as well, and in fact to ask the Board to approve their alternative method as opposed to the preferred alternative method that might be suggested by the proponent.

The reason why this is so is that through all of that we are still talking about the same undertaking, and all we are talking bout is just different ways of carrying out the undertaking.

Hydro has prepared alternative methods and put them before the Board. We have seen Plan 15, 22 and 24 described. And more recently we have seen an update.

Plan 15, 22 and 24 all had associated with it what Hydro has described alternative methods of carrying out a program, and in my submission the Update isn't yet another alternative method of carrying out a program.

The jurisdiction that relates to alternative methods comes from Section 12 of the

Environmental Assessment Act. Section 12(c) says that
the Board will have to decide if it accepts the
environmental assessment, but 12(c) also says that the
Board can amend and then accept the environmental
assessment, and this has been reflected in previous
cases. There are a whole line of cases and decisions
that say that the environmental assessment is not
simply the document that the proponent puts before you
in the course of a hearing; it also includes the
evidence that is brought before you and includes the
evidence brought before you by intervenors, and by
implication of course would include alternative methods
described by both the proponent and by other
intervenors.

At the end of the hearing then it's open to the Board to say, we have heard from everybody. We are going to incorporate everything that we have heard into the environmental assessment; in other words, we are amending the environmental assessment, and then the Board can decide at that point if it has enough information to make the next decision which is to approve or not to approve.

It's because of this process that I was somewhat surprised by Mr. Poch's submissions about notice requirements, that intervenors somehow have to

put other parties on notice and have to go through a complete environmental assessment process for their preferred alternative method. We are talking about one environmental assessment at all times and about one undertaking at all times, and an intervenor who puts forward an alternative method of carrying out the undertaking would simply be asking the Board to incorporate that alternative method into the environmental assessment that has been placed before it and then would make arguments with respect to approval.

There has been a lot of discussion about the ability to amend an undertaking, and certainly the Board has clear power to impose terms and conditions if it's going to approve. And in my submission, the imposition of terms and conditions in many cases do act very clearly as amending the undertaking that has been put forward.

An example could be a proponent who puts forward an environmental assessment seeking approval to proceed with building a landfill site. It would be open for intervenors to say there should also be a recycling program associated with that. This would be an alternative method of carrying out waste management, and in fact, the history of Board decisions has been that that kind of thing has been added to approvals.

1	I guess that background then, the next
2	question that we have to address in the context of this
3	hearing is just exactly what is the undertaking that
4	has been described by Ontario Hydro.
5	If we accept that the undertaking remains
6	the same but we can have a whole range of alternative
7	methods, we then have to find out just exactly what is
8 .	that undertaking.
9	Ontario Hydro has clearly developed a
10	planning process that looks at a 25-year planning
11	horizon and within that 25-year planning horizon they
12	define a five-year action plan, and they say this
13	action plan is a program in respect of activities.
14	Now, given that the approval is
15	permission to proceed with an undertaking, another way
16	to ask the question what is the undertaking is to say,
17	what it is that Hydro wants to proceed with.
18	From their evidence and from the
19	documents that we have forward, what they want to
20	proceed with is site-specific environmental
21	assessments. They don't want to proceed with projects
22	in this five-year period, they want to proceed with
23	environmental assessments of projects, which is a much
24	different thing.
25	Clearly, many of the projects that they

1	would be capable of bringing forward wouldn't even come
2	into action until well after the five-year period. In
3	the original program, for example, they asked for
4	approvals relating to nuclear facilities and they have
5	given evidence that the lead times for those are at
6	least ten years. Well, that brings us far outside the
7	five-year period
8	So really what Ontario Hydro is asking us
9	to proceed with is environmental assessments of
10	projects.
11	And when we look at the wording used in
12	the program, the specific approval they are requesting
13	is for the requirement and rationale for particular
14	projects. The reason why they put that forward is that
15	rather than have the debate that we are having at this

is for the requirement and rationale for particular projects. The reason why they put that forward is that rather than have the debate that we are having at this hearing about all the pros and cons of all of the options, they want that debate settled so they can simply bring forward project EAs and on their own individual merit.

[2:59 p.m.]

Now their words are they want approval of the requirement and rationale for new supply. And we saw the list of new supply at the beginning of the hearing. And since the Update we have seen a shorter list. But the thing that's common to those two lists

- is the approval wording, and that is the requirement
  and rationale. And that's what they want approved.

  Not the projects themselves, the requirement and
  rationale for proceeding with environmental assessments
  of projects.

  To look at those two items separately,
  starting first with requirement: Is there a
- starting first with requirement: Is there a
  requirement for bringing forward EAs within a five-year
  period after this decision? They will point to their
  forecasting results and they will have described and
  have described the methodologies for forecasting.

They will point to costing methodologies as well. These are intimately related because the way you do your costing will determine the economics of some of the alternatives to some of the things that Hydro suggested it wants to do.

In order for you to approve the requirement as they have asked you to then you will have to in effect approve the methodologies they have used to come up with the program that they are proposing to proceed with, a program of environmental assessments.

The second element that they seek approval is the rationale. And the rationale for proceeding with EAs basically incorporates the

forecasting and costing results along with the results
of the integrated planning process that has also been
described in great detail and cross-examined on in
great detail throughout this hearing.

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Now the key point I think that divides many of the parties on this is: Is this an approval for 25 years or is this an approval for five years? It's a bit of both and I say that for this reason. Ontario Hydro is looking at a 25-year plan and making decisions that it will have to get approval for within five years, so the approval in effect is the requirement and rationale which is established by their 25 year view of the world for the purposes of a five-year program. So in effect the approval is simply going to last for five years. After that, Ontario Hydro is going to have to get into the next stage of this process and again they have supplied a reason for that. They have said that we have a better idea of what is happening in the short term than what's happening in the long term, and we believe that our long-term picture justifies our short-term action plan. Please give us permission to proceed with our short-term action plan. In so doing you will have approved the way they did their 25-year planning process but that approval will have weight only for the

purposes of the five-year plan.

In coming to a decision that says proceed

or not proceed, however, you will have to examine all

of the assumptions that went into developing this

25-year plan that went into the forecasting that

Ontario Hydro engaged in. And all the judgments that

they bought to bear on decisions that they made.

In saying that there is a requirement and rationale for proceeding with project EAs within a five-year period following the DSP decision, Hydro in effect is saying that it has properly answered the following questions. And these are questions that appear both in the Update and in earlier submissions:

Is there a need for major new supply over the next 25 years? What is the proper role for demand management, for non-utility generation, for facility rehabilitation and life extension.

What is the proper role for the so-called alternative technologies and for the various other supplies such as hydraulic, hydroelectric fossil and nuclear technologies. All of those questions are still on the table and remain unchanged. And in fact in the Update, that list of questions appears in Exhibit 452 at page 32.

So the nature of the bait has not changed

at all. The requirement and rationale for building any new supply whatsoever is still there to be seen. It was presented through the course of this hearing partly in documents that were filed at the start and partly in continuing evidence.

And in answering the questions that are posed by the approval they have requested, Hydro has made various assumptions and judgments and choices and has balanced various things and people have challenged those and will continue to challenge them I am sure.

Other parties have had all the opportunity they need in order to do that and presumably will continue to have an opportunity. And at the end of hearing we will have as complete a picture as I think we can hope to have given that we have had 200 parties in this process, parties and participants, over a period of 2 years with intervenor funding of up to 30 million, perhaps more at that point.

Having said that then, after the five-year period is over, the five-year period that follows any decision this Board may make, Hydro is going to have to build on that process. We can't lock into a 25-year blueprint for several reasons. First of all, there is going to be ongoing public consultation

l	and we can't preclude that public consultation by a
2	25-year blueprint that has been described by this
3	Board. We can do it for the five-year period and then
1	we should be taking another look at it to see where we
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In addition, we will have some real-time experience with Ontario Hydro's program for demand management and non-utility generation and so on. And finally, there will also be continuing work by the government in the policy arena. Again, that is why Ontario Hydro has designed an approval that relates to five years rather than 25 years.

Certainly it will be open to the Board to make findings about whether the 25-year period is an appropriate planning horizon, whether the five-year period is an appropriate action plan length of time and so on, but these are also substantive issues for the hearing.

Now the Municipal Electric Association is asking you to dismiss this hearing because the undertaking in effect has changed. My submissions clearly at this point are saying no, the undertaking has not changed. It is still what it has always been. The only thing that has changed has been the specific list of projects, but Ontario Hydro is not seeking

approval of a specific list of projects. It is seeking approval for the requirement and rationale for new supply and they are suggesting that the new supply is in a particular form. That's what they asked an approval for. Many other parties will be urging upon you perhaps a different mix and these would all constitute alternative methods, all of which are within the jurisdiction of the Board to approve.

The basis for the MEA's objection seems to be largely based on concerns that they have relating to substantive issues that are in fact squarely before the Board. They point to a change with respect to fossil fuels stations, for example, saying that this expanded life extension program is something completely new.

The demand/supply planning strategy which is Exhibit 74 has been there from the beginning of this hearing and clearly that strategy says that there will be changes; and, in fact, page 3 of the strategy says that every year there is going to be a new plan and there is a chart to demonstrate that.

And I can't believe that the MEA is caught by surprise because things change over time. To suggest that the proponent should be frozen with the picture it presents to the Board that was drawn in 1989

strikes at the very logic of even doing any planning at all.

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In a hearing that could easily be two years long, things change. We had a recession that has had a dramatic impact during the course of this hearing. That is going to have an impact on the short-term economic forecasting. And Ontario Hydro has made other judgments which it will continue to make and which demonstrates, in fact, the flexibility of the process that they are putting forward before you.

In effect that issue and the other issue that MEA has touched on, and that is a suggested shift in planning to the upper to planning for the median, these are substantive issues. Ontario Hydro has always said it does upper forecasts, median forecasts and lower forecast and clearly it was open for any party to say, instead of planning the upper, you should go to the median or to the lower or maybe you should do it in a completely different way. But that question was on the table from the beginning and it is still on the table. And the fact that Ontario Hydro has suggested it might make more sense now to go to the median perhaps rather than the upper, that's a question that the Board will have too rule on and would have had to have ruled on anyway. This is not a new undertaking we

are talking about.

What it comes down to is that the MEA, their argument, at least to my ears, sounded largely like a rehearsal of their final argument. They really have to make a case like every other intervenor will have to do and put it before the Board and let the Board make its decision at the end of the day.

at this point to say in effect Hydro you don't have permission to proceed with your undertaking. Hydro hasn't finished it's case. It's at least entitled to finish its case, and I would suggest that even at the end of its case it would still be premature for the Board to consider not giving permission to proceed with its undertaking.

The intervenors and there are many of them who come from a variety of points of view have spent a lot of time and effort in preparing information which is going to be valuable to the Board and valuable to Hydro and which properly will be part of the environmental assessment that you are looking at.

And to end a hearing, even at the end of the proponent's case, in a case that is as complex as this one would really be unfair to the intervenors who are entitled, I think, to put forward what they have

1 prepared for the assistance of the Board. 2 As Mr. Mark suggested, Ontario Hydro may have it right in the end. And what I am suggesting is 3 let's wait until the end and see with the assistance of 4 5 everybody including the Municipal Electric Association, who have been funded because they were able to convince 6 and intervenor funding panel that they could assist the 7 Board on the issues before it. 8 9 They weren't funded to come in here and 10 simply attack the hearing and have it dismissed at an early stage. They were funded to assist the Board with 11 12 a case and they defined what kind of case that they 13 might bring to the Board. 14 THE CHAIRMAN: You would agree, would you 15 not, with the submission of Mr. Rosenberg, that if 16 there is no jurisdiction there is no point in 17 continuing the hearing? 18 MR. MORAN: Yes. And I would like to 19 address that argument at this point. 20 THE CHAIRMAN: If it's in your quiver 21 then bring it out when it's appropriate, but I just 22 don't want to overlook that. 23 MR. MORAN: Thank you, Mr. Chairman. 24 And I will address it now. The question 25 of whether you have jurisdiction or not in my

submission is answered in the affirmative. You do have jurisdiction. Ontario Hydro has filed an update but it has withdrawn nothing. The original thing is still there if you want to look at it as an alternative which Hydro wants to treat it as now. It is still there.

The Update is a variation on the figures. It's a re-integration of figures. In the demand management panel and the non-utility generation plan, Ontario Hydro told us very clearly that numbers were changing and they told us what the numbers were for those issues and said at the end of year we will do our normal reintegration. The strategy says that is going to happen anyway. Everybody knew that or should have known that.

So you still have jurisdiction. The fact that Ontario Hydro continues to do planning and continues to take recognition of the fact that things do change from a planning point of view as you pass through a year of hearing time is I think an expected result.

So the jurisdiction remains because nothing has been withdrawn from you, nothing new has been put into replace something that was originally put in front of you. The undertaking at the very beginning was aimed at meeting electricity needs over a 25-year

1	period. It still remains that. And the undertaking
2	was confined to the approvals
3	THE CHAIRMAN: Is it hard for me to
4	understand your statement that nothing has changed and
5	nothing has been withdrawn. I still have Mr. Mark's
6	argument ringing in my ears. One is the life
7	extensions of the fossil plants and the other is that
8	the number of approvals requested have been
9	considerably reduced.
10	MR. MORAN: That's right. Some of the
11	emphasis
12	THE CHAIRMAN: So you are not saying that
13	a change
14	MR. MORAN: Those are definitely changes
15	but they are not changes to the undertaking. Those are
16	changes in the details that Ontario Hydro relies upon.
17	The demand/supply planning strategy which
18	is a common element to all of the plans that Ontario
19	Hydro has put forward says that rehabilitation is going
20	to be an element. The Board's notice also makes
21	specific reference to that as well.
22	On the first page of the notice, there is
23	a list at the bottom which says that "Each alternative
24	Demand/Supply Plan includes" And in that list,
25	rehabilitation and retirement of existing generating

stations is on that list.

And certainly we have had evidence from

Ontario Hydro that says that they have now changed the

emphasis that they want to give to life extension and

clearly that is a question that this Board will have to

rule on. What is the appropriate role for life

extension? That was always a question that was on the

table.

Originally they said the appropriate thing to do is to run them for 40 years. Now they are saying that perhaps some stations if they meet certain standards and parameters maybe they can be run longer than. But the essential question is still the same:

What the appropriate role for station extension and station rehabilitation? And that's been on the table right from the beginning.

So when I say things haven't changed, it's because the questions that have been put to you to decide upon, the questions haven't changed. Hydro's answers to some of those questions have changed. There is no doubt about it. And certainly some of the intervenors are going to say there are even other answers to some of these questions which may be even better. I mean these are all alternative methods that we are talking about, and that's exactly the nature of

the process that you were invited to rule upon when it was referred to you in the first place.

You have to answer all those questions.

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And the fact that Hydro changes some of its original answers, which were formulated back in '89 and prior to that, to reflect current events does not amount to a change in the undertaking. It amounts to a changing in some of the answers that they point to in order to say you should give us an approval to proceed with certain environmental assessments within the next five years.

Mr. Rosenberg has said that you should only look at Exhibit 3 and Exhibit 452 to decide whether the undertaking has changed. I mean that flies again in the face of previous decisions that says the entire environmental assessment is composed of not just the original documents that are filed but the additional evidence that comes in through the course of a hearing, including intervenor cases. And the Board can exercise its amending power at the end of the day to include all of that information in the environmental assessment under 12(c) of the Act. And then go on to say whether it wants to accept the EA, having amended it in that way, and then to proceed to the final question: Do you get permission to proceed with your undertaking?

I see a parallel between what has happened with 452 and what happened in the NUG panel. We had late-breaking news just prior to the start of non-utility generation panel, and people were scrambling because they didn't have the information available to them to try to understand the basis for the changes.

Those changes were basically giving a different answer to the question: What is the appropriate role for non-utility generation? And parties who were trying to prepare for cross-examination said, it's going to be very difficult for us. The Board responded to that by ordering Hydro to provide information and gave them a deadline. In my submission that's the way this issue should also be dealt with.

The deadline that was given then would be too short to deal perhaps with the complexity of some of the changes that 452 represents, but I believe that the parties do need to have a better understanding of some of the details that went behind the decisions that we see reflected in 452, the new answers to the original questions that were placed before the Board.

I don't believe that it is necessary to adjourn the hearing. The appropriate roll for nuclear

1 power is still a question that is still squarely on the 2 table. In my submission, we can continue with Panel 9. 3 and parties who were going to cross-examine on Panel 9 4 are still going to have the opportunity. The question hasn't changed. Ontario's 5 6 decision to defer that particular option for a longer period of time so that they don't have to seek an 7 8 approval within the five-year window following this 9 hearing, in my submission, doesn't make a lot of 10 difference to the question: What is the appropriate 11 role for nuclear? 12 Ontario Hydro is proposing one answer to 13 that question. Other parties are going to propose other answers. And I don't believe an adjournment it's 14 necessary to allow parties to go ahead with Panel 9 and 15 cross-examination of Panel 9. 16 17 In addition, we have the March break 18 coming up.... which people may or may not have plans. 19 [Laughter] 20 And then conceivably there could be some break after that to allow people to continue their 21 22 preparation. 23 [3:20 p.m.] 24 I think the appropriate thing for the 25 Board to do, in my submission, is to tell Hydro -- or

to tell the intervenors to present to Hydro the questions that they have, what information do they need to get, and for Hydro to respond to those much in the same way as they were required to do in the non-utility generation panel.

My understanding from Hydro is that the planning issues are going to be addressed in Panel 10 and that will include people who will be there to explain implications for the Update as the arose and how they impinge upon other panels. My understanding is that we will have people who can answer forecasting questions and costing questions and major supply questions because everything is going to be balanced at point anyway.

Mr. Campbell may be able to give you better information about the kind of make up of Panel 10 that they are envisaging.

I don't believe it is necessary to reopen panels because the issues that previous panels have dealt will, in any event, be reopened to a certain extent in Panel 10, and I believe we can proceed to Panel 10 to deal with them. The only question is, how much time does Hydro need to provide better information to the parties to support the changes that are presented in Exhibit 452.

1	Subject to any questions you may have,
2	those are my submissions.
3	THE CHAIRMAN: Thank you, Mr. Moran.
4	We have had nearly now two full days of
5	discussion of Exhibit 452, very interesting and fairly
6	wide-ranging, and we have heard from everybody now.
7	Are there those who would like to submit
8	reply?
9	I hasten to say reply is reply, not
. 0	repetition of points already made.
.1	Does anyone want to put in reply?
. 2	Just a second, I have got to write the
.3	names down. It looks like we have got a lot of
. 4	volunteers here.
.5	Mr. Poch, Mr. Shepherd, Mr. Kelsey, Ms.
.6	Kleer, Mr. Mattson, Mr. Power, Mr. Rodger, Mr.
.7	Heintzman, and I take it Mr. Campbell.
.8	Is that correct?
.9	MR. B. CAMPBELL: I think you can count
0	on that. [Laughter]
1	THE CHAIRMAN: Anybody else?
2	MR. MARK: I'm sorry, Mr. Chairman, I am
3	not quite sure of the procedure. I seemed to have
4	gotten lost somewhere along I way.
	y and the desired around a may.

1	MR. MARK: I am just a bit lost in the
2	procedure we are going.
3	THE CHAIRMAN: We are talking about reply
4	in the sense of responding to the statements that have
5	been made on the various issues that have been
6	discussed over the last two days.
7	MS. PATTERSON: Which would mean that you
8	have an opportunity to reply to anybody who spoke after
9	you.
10	MR. MARK: All right, fair enough.
	THE CHAIRMAN: And it follows from that
12	that we will go in the reverse order of which they were
13	made at the first, and that looks like
14	My order - and it is based on a usually
L5	<pre>faulty memory - would be that Ms. Kleer would go first;</pre>
16	Mr. Mattson second; Mr. Kelsey third; Mr. Poch fourth;
17	Mr. Shepherd fifth; Mr. Power sixth, Mr. Rodger
18	seventh; Mr. Heintzman eighth, and Mr. Campbell ninth.
19	Is does that fit?
20	All right. Shall we take the break and
21	then we can do the exercise after that.
22	THE REGISTRAR: This hearing will take a
23	15-minute break.
24	Recess at 3:25 p.m.
25	On resuming at 3:40 p.m.

1	THE REGISTRAR: Please come onto order.
2	This hearing is again in session. Please be seated.
3	THE CHAIRMAN: I think we all would hope
4	that we would be able to finish this afternoon. A
5	corollary to that is that I wouldn't want anyone to
6	leave here not having an opportunity to express any
7	view that they think will be of help to us in dealing
8	with these difficult problems. We are prepared to sit
9	late tonight, late means 5:30 and if we don't finish
10	then, we will recommence tomorrow morning at ten
11	o'clock. But nobody, I repeat, nobody should feel
12	under any time restraint, but they should feel under
13	the usual restraint that counsel have in the ambit of
14	reply, which you are all quite familiar with.
15	MS. KLEER: And to that end, Mr.
16	Chairman, I hope to be two minutes.
17	REPLY BY MS. KLEER:
18	I submit that to accept the submissions
19	of AECL and the Government and others that suggest that
20	the Update provides just another alternative method
21	creates a serious problem and I will try and illustrate
22	that.
23	If AECL or anyone convinced this Board
24	that one of candidate DSPs that was in Exhibit 3 was a

better alternative method than the DSP Update, and that

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therefore the Board should approve that alternative
candidate DSP, for example, Plan 15, it would mean that
Ontario Hydro would be forced to accept approvals that
they are not now asking for. In other words, you would
be giving them approval to proceed with something other
than the undertaking, and I suggest that section
12(2)(d) simply does not permit you to do that.

If you imagine that Ontario Hydro were a private sector proponent, just for the moment, it seems obvious to me that no intervenor could come to a hearing with a private sector proponent and tell them build a bigger facility because we want you to.

made their choice to have handled X amount of tonnes of waste and they submitted their EA in respect of that, and I think that this is analogous, Ontario Hydro is no different from a private sector proponent in the sense that they can define what they want in the undertaking and they have done so by the approvals that they have now requested in Exhibit 452.

You might be convinced and make a finding of fact that Ontario Hydro should plan to the upper.

But for the purposes of approvals, you could not give approvals for proceeding with site-specific applications in respect of the facilities that are more

1	than those that Ontario Hydro is now seeking approvals
2	for, otherwise I think Section 12(2)(d) simply becomes
3	a meaningless section and it is not being observed.
4	Those are my submissions, Mr. Chairman.
5	THE CHAIRMAN: Thank you.
6	Mr. Mattson?
7	MR. MATTSON: Thank you, Mr. Chairman.
8	REPLY BY MR. MATTSON:
9	I had a number of submissions to make but
10	I am going to leave my notes and I think I am going to
11	summarize this as quickly as I can.
12	I think that all the arguments you heard
13	this morning from the MEA's counsel can all be made
14	within the course of this hearing.
15	The only difference is the request that
16	they are seeking, the motion they are seeking, and that
17	is to dismiss the hearing and start anew, or to go
18	through with the assessment and argue that either the
19	assessment is incomplete or (B), that Ontario Hydro and
20	their undertaking does not comply or cannot be
21	justified by the assessment as set out, the seven-year
22	consultation program, the strategies that they
23	discussed, et cetera, et cetera. We have heard about
24	the public consultation.
25	The only difference between those two

options, Mr. Chairman, and this is the crux of
everything, is that the MEA cannot get approval for the
electricity generation that they would like, that they
sought originally at this hearing. This Board cannot
approve 5,000, 6,000 megawatts when the proponent has
defined the undertaking as being the requirement and
rationale for 24- to 2,800. Alternative methods would
have to seek to replace that and do a better job of it,
better than the preferred undertaking that Ontario
Hydro has put forward. That's the distinction.

years ago and argued for funding and they argued for funding put forth in alternative 2, the only chance that we had at this hearing was denial. And if you look around the room, Mr. Chairman, you look at position, probably we are the only intervenor here who truly seeks denial because we don't believe the assessment — or the undertaking right from Day 1, right when it was still a \$60 billion undertaking, we did not believe it was appropriate or in the interests of Ontario.

Now, Ontario Hydro, they haven't changed the process, the process is still part of the assessment. The consultation is still part of this assessment. This isn't Meaford and Simcoe where the

	proponent didn't do the work, didn't go out and do the
2	appropriate consultation, didn't look at all the
3	alternatives, didn't look at all the alternative
4	methods, and therefore their preferred alternative was
5	one that wouldn't have been chosen by the Board if all
6	the material was in front of them. All the material is
7	here. It's all part of the assessment. The MEA has
8	all that material.
9	The MEA has been preparing evidence, It
10	take it for some year-and-a-half, all that evidence
11	could be used to show that the undertaking that Ontario
12	Hydro now has before you, the Update, is inappropriate,
13	should be denied. They are not us losing anything at

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They are very upset because their favourite alternative can no longer be chosen and they are upset because that favourite alternative no longer fits within what this Board can do.

this hearing by going forth and making that argument

before you, except they are losing potential.

Maybe the Minister can. Maybe, Mr. Chairman, this Board can say we deny it because it doesn't live up to what we think the need is Ontario, and then the Minister can turn around - because this isn't the ultimate authority, this Board - the Minister ultimately could turn around and say, you're right, we

are going to give them approval for 5,000 megawatts.

But at this hearing, Mr. Chairman, it's the proponent who defines the undertaking and the undertaking is clear. It's the requirement and rationale for specific components, specific components of an entire assessment that once it was so broad and there was so much money in the undertaking it made sense, now, is so much smaller many of the people here don't think it makes sense anymore, because why have this huge assessment only to have such a small narrow undertaking. That completely and totally ignores the option of denial. Completely. A legitimate and completely totally prudent decision that this Board could make and no one could deny was a waste of time and money. But no one else here put it forward.

And that's the road we are heading down,

I believe, Mr. Chairman. That's what the evidence is
showing. Not that we are not going to have enough
power out there in five years, but that Ontario Hydro
has recognized that rates, that demand is dropping off,
and that they have reacted, as a proponent should, to
the evidence that's gone before this hearing.

So it's not the process that wasn't followed. The process is before you. You can look at the process, MEA can look the at process, we are all

1	able to look at the process, it's there. It hasn't
2	changed. The only thing that's changed is the
3	proponent's reaction to it. They have narrowed the
4	undertaking.
5	My final point is I will not disagree
6	that there is no longer the potential there that this
7	Board could approve a massive supply construction
8	program, that isn't there and it was there before. But
9	that was done in front of your very eyes, the
10	information was all there and it has been done right in
11	your front of your eyes at the hearing process, under
12	the scrutiny of this process. So nobody could complain
13	that the option wasn't looked at, or that the original
14	DSP isn't on the table. It's still here, and hopefully
15	the MEA's evidence will support of support it, because
16	that's supposedly what they are arguing here, and they
L7	can say to you that's the right one, and they still
18	have an option. You still have an option, deny it,
.9	it's still there.
20	We are not killing their rights, the
21	rights still exist within the course of this hearing.
2	Those are all my submissions.
13	THE CHAIRMAN: Thank you.
4	Mr. Kelsey?
5	MR. KELSEY: Thank you.

## SUBMISSION BY MR. KELSEY:

I want to just deal briefly with the jurisdictional question, the legal arguments that have been made.

It's certainly my submission Mr. Mark is perfectly entitled, contrary to what Mr. Moran says, to raise the jurisdictional question, but it depends, I think, the whole jurisdictional argument depends upon a finding that the undertaking, whatever it may be, has been withdrawn. And that's the position that has been put on one extreme, and then the other extreme is the position that the government repeats, that nothing has changed. In my submission, those are both wrong. And repeating often nothing has changed, does not fact lead to the conclusion that nothing has changed.

The argument that was put forward on the law with regard to your jurisdiction, Mr. Rosenberg cited the Anisminic as if it were the law of Canada. It was a decision of the House of Lords in 1969, 3-2 decision, and it was the high water mark of judicial intervention and administrative tribunals and it was followed once in Canada in the Metropolitan Life Decision of Supreme Court of Canada which I think was 1971, thereafter it went into significant decline. And even in England the quotation from De Smith in 1985 is

1	not supported by the English authorities, but it's
2	certainly not the law in Canada.
3	And the position that I think you are in
4	is that as long as you make a reasonable interpretation
5	of the statute, all that old law about the distinction
6	between the heart of your jurisdiction and collateral
7	issues in Canada has gone, and as long as you stay
8	broadly within the confines of the Act there is not a
9	problem with jurisdiction.
10	The remedy, it seems to me, if there a
11	jurisdictional problem, is two-fold: Either it's in
12	Hydro's hands or it's in the Board's hands.
13	If there is a problem it's that there is
14	an undertaking because there is a still a program. And
15	it would seem to me that it's only if there is no
16	longer a program for which approval is sought, that
17	there is no undertaking and your jurisdiction would

an undertaking because there is a still a program. And it would seem to me that it's only if there is no longer a program for which approval is sought, that there is no undertaking and your jurisdiction would disappear. But as long as there is a program then there is a jurisdiction and you are entitled to find that there is a program.

The difficulty it seems to me arising from the submissions that Hydro has, is in establishing at this stage a requirement and rationale for the particular program that it now puts forward in the form of an Update. And it may well be that you can say that

1	the various environmental components have already been
2	considered, but I don't think that that solves the
3	problem, because if I can just use a briefly analogy,
4	if the president of Hydro developed a rationale for a
5	form of transportation which was a Cadillac or
6	Oldsmobile 98, it could not then I think say that the
7	same requirement and rationale could be applied to a
8	Honda Civic if that's the program for transportation
9	then put forward. The elements in terms of engine and
10	chassis and wheels are all the same, but the
11	requirement for one form of transportation is quite
12	different from the rationale for another form of
13	transportation. And similarly here, all the elements
14	that go into the program, although looked at separately
15	from an environmental point of view, lead to one
16	conclusion, but they have to be looked at quite
17	differently in order arrive at the Honda Civic that
18	Hydro is now putting forward. That I think is the
19	distinction.

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So if Hydro now is it given the opportunity through an update panel to provide us with the opportunity to analyze and you to form conclusions on the rationale from the new program, then it would seem to me that there was no jurisdictional problem.

The other way approaching the

1	jurisdictional issue, of course, as some have suggested
2	is to find it to be premature, and that's linked to the
3	same argument, because to say it's premature is to say,
4	well, we are at a certain stage and we don't know what
5	Hydro now intends to do, but if you make certain
6	findings with regard to the scope now of the hearing
7	and give Hydro an opportunity to perhaps be a little
8	clearer on its understanding of the undertaking and of
9	what the Update is, then I think those jurisdictional
10	issues will disappear.
11	There is one final thing that I wanted

There is one final thing that I wanted to mention. Mr. Greenspoon showed me this morning the environmental assessment that was put forward for the Class EA for Timber Management, and it is so clear that it is hard to imagine, and it follows so closely the scheme of the Act that it is hard to imagine that there would there be the same problems with defining the undertaking that there are here.

[3:55 p.m.]

There there was an amendment. And when I look at the index, I see "Purpose of the Undertaking":

The purpose of the undertaking is to provide a continuous and predictable supply of wood for Ontario's forest products industry.

1	And then "Description of the
2	Undertaking":
3	Timber management consists of the
4	following sequence of activities:
5	harvesting, renewal, maintenance.
6	So you have a clear statement of purpose.
7	And of course the analogy here, I would say, is that
8	the purpose is to ensure that there is a continuing
9	supply of energy for the province. And then the
10	specific activities constitute the description of the
11	undertaking. Then there is a section on how it should
12	be implemented. Then there is a section on
13	alternatives to the undertaking and it actually says
14	what they are: the do nothing alternative; the harvest
15	with no renewal alternative. And then it sets out very
16	clearly alternative methods under four headings:
17	provision of access to timber resource, harvest,
18	renewable, maintenance. And it sets out various ways
19	that you can do that, and that takes four or five pages
20	That, unfortunately, is not what was done
21	here. That's why we have a problem and why I am afraid
22	it's up to you to extract from the documents that have
23	been submitted what it is. But in my submission if
24	that analogy is applied here, you have a specific
25	purpose and you have a specific program and that

1	program, although shrunk, is still here and you still
2	have jurisdiction.
3	Thank you.
4	THE CHAIRMAN: Thank you, Mr. Kelsey.
5	Mr. Poch.
6	REPLY BY MR. D. POCH:
7	Thank you, Mr. Chairman. I would like to
8	respond to a few of the points Mr. Mark made. We
9	certainly agree that Hydro has changed its strategy and
10	I simply remind the Board that if the undertaking is
11	not the planning strategy or methodology but rather is
12	the program, that presents no problem because the Board
13	has the power under Section 12 to amend the EA.
14	The fact that Hydro is offering up this
15	change as opposed to it surfacing from some other
16	party, I would suggest is a distinction without a
17	difference, as Dr. Connell's light-hearted perhaps
18	suggestion made clear. It would be absurd to ask the
19	proponent to remain silent when it sees the light
20	because it's not allowed to advocate its new-found

wisdom, if you will. The question then becomes: If we

don't have a jurisdiction problem because of the change

of the strategy, do we have a jurisdictional problem

because of the change of the undertaking, the program

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itself.

1	If the program is defined as a program,
2	which is made up of a mix of components from amongst
3	the options originally included in Hydro's application,
4	limited as we say by this time component, so long as
5	the mix is still reflective of a selection from that
6	original menu, I would submit we have no problem.
7	Mr. Mark suggests there are new
8	components that weren't on the original option; that
9	being the fossil life extension. He says that is new
10	and I would agree it is new. However, again, if the
11	Board accepts the definition of the undertaking we have
12	urged upon you, that is, the program necessary to meet
13	the projection of need by the year 2007 roughly, the
14	fossil life extension is all beyond that. The earliest
15	fossil retirement I believe in the original plan was
16	2009, so it would be extending the availability of
17	those facilities from that day on. It is analogous to
18	the possible nuclear fossil options in the long term.
19	It may be part of the plan. It is therefore part of
20	the rationale and it is a change, but it is a change to
21	the environmental assessment, the rationale, not to the
22	undertaking, because it is not included in the
23	approvals portion.

Mr. Mark suggests that the original undertaking included a program in Plan 15 that took us

- 1 through to the year 2014 and the new program doesn't. And I would point out and the clearest example of this 2 is at page 15-35 of Exhibit 3 that the original plan 3 that Hydro put forward did not take us through to the 4 5 year 2014. There on the page I have referred to, one 6 can see that there are, in Case 15, CANDU Cs and even CANDU Ds coming in at 2008, 2012. Hydro did not seek 7 approval for those. They were part of a plan, part of 8 9 a rationale, but not part of a program. This is consistent with our view that the undertaking has 10 11 always been limited to a period of time that is not 12 co-extensive with the 25-year planning horizon used for 13 the rationale. 14 Mr. Mark complains that Hydro didn't say 15 five years in the Balance of Power and he is correct. 16 What Hydro said appears at page 18-1 and it refers 17 specifically not to five years but to those approvals 18 expected to be submitted before December 31, 1996. And we have been perhaps generous to Hydro by referring to 19
  - THE CHAIRMAN: But in the Update they changed that date to five years, I think.

that as five years past the close of the hearing and

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perhaps I might --

MR. D. POCH: Yes, that's correct. And Hydro is taking the interpretation of what they said

1	with a fixed date as being representative of	а
2	rationale which was the five-year rationale.	

I think it is open for some to argue that they are stuck with that date and they can't treat it as the more flexible five years from whenever this hearing ends. But I don't believe anything turns on that today. The point is it was always set out in the Balance of Power that there was this cut-off date for what approvals are being sought and in my view of the terminology therefore what is included in the undertaking itself.

Mr. Mark suggests that Hydro is now saying in its Update if there is higher than expected load growth, Hydro will at that point bring on some of these longer term options for approval. I think it is clear from a fair reading of that Update document and from the evidence before you, that lead times would preclude -- Hydro has made a choice. They are giving up the chance to do that. And indeed at page 15 of the Update, the new coping strategy is explained in the paragraph following the one Mr. Mark quoted, in the last paragraph where it reads:

The considerable spread now present between need dates under median and upper load growth suggests that alternative

1	approaches to providing flexibility be
2	considered. In particular, short
3	lead-time options such as gas-fired
4	combustion turbine units and additional
5	non-utility generation.
6	And it's clear that non-utility
7	generation in the Update is that insurance policy.
8	I would suggest that MEA's key concern
9	here is that Hydro has changed from planning to the
10	high to the planning to the median. I would refer you
11	to our opening argument where we make the point that
12	there is no such thing as planning to a high and
13	building to something less; that the plan becomes a
14	self-fulfilling prophecy, so of course we welcome this
15	shift.
16	Mr. Mark has suggested that Hydro has
17	premised the Update on slower load growth, and I would
18	suggest that that is simply one of the factors pointed
19	to. Clearly there are other differences. They are
20	planning to the median. They are capturing the effect
21	of fuel switching about which we heard so much
22	evidence.
23	They are acknowledging the availability
24	of NUGs as a swing option. But most important, Hydro
25	has recognized the greater uncertainty, and that

1	greater uncertainty means planning to the high is now
2	untenable because of the long lead times. It would
3	because of those lead times require commitment of major
4	supply before we had the knowledge of what the actual
5	load would be. And nine times out of ten, this isn't
6	in the evidence, that's a colloquialism, nine times out
7	of ten they would be over billed and they would pay a
8	cost penalty for that.

And the result of the recognition of broader uncertainty has been a shift in the response portfolio. And let's not forget it was the MEA amongst others, including myself, who attacked Hydro in Panel 1 for their narrow uncertainty, for their failure to recognize uncertainty.

Now perhaps MEA thought that bigger uncertainty bounds would mean a yet higher load forecast and even more of an argument for major supply. As it has turned out, we have tripped over the line and now the logic takes us somewhere else and they are, I would submit, stuck with it. So in short, this strategy is in fact better at coping with changing futures and I don't see my friend's complaint.

Again, that's an acceptable change if the approach is not part of the undertaking and this flexible program is. Clearly Hydro included some

- flexibility in its original program and is entitled to rely on that.
- Mr. Mark offers the affidavit of Mr.
- 4 Yokell. I don't know if I have pronounced it right.
- 5 And I read that affidavit to say that in traditional
- 6 electricity planning what Hydro is doing is not the
- 7 right way and therefore the Board should throw them
- 8 out.
- 9 Now while I may agree with Mr. Mark that
- 10 Hydro hasn't presented an adequate case, I don't think
- it is conclusive to simply say it is not the way it is
- 12 traditionally done in electricity planning. This is
- not an electricity planning hearing. This is an
- 14 environmental assessment hearing. It is a much broader
- hearing. The Board has to consider factors much
- 16 greater in range than a utility planner would
- ordinarily be required to consider.
- Mr. Rosenberg says if you find that the
- 19 environmental assessment has changed or the undertaking
- 20 has changed, it's fatal as a matter of jurisdiction.
- 21 And that simply in my view with respect to the former
- 22 at least ignores the Board's power to amend the
- 23 environmental assessment to capture the proposed -- I
- 24 would word what Hydro has done is proposed a change in
- 25 strategy.

1	With respect to whether the undertaking
2	has changed, even if Hydro hadn't been careful to cast
3	its program as being a flexible collection, clearly
4	there has to be some ability for the undertaking to
5	have some flexibility. If they were proposing a single
6	nuclear plant, clearly if they chose to, if they chose
7	to change the one valve that couldn't be fatal. There
8	has to be some degree of flexibility allowed in the
9	undertaking. There has to be some ability to deviate,
10	within limits. And the question is: Have they tripped
11	over the line of the limit? Has the change to the
12	undertaking been so fundamental or is the proposed
13	change to the undertaking so fundamental that we are in
14	trouble.

I would say in the case because we are dealing with a program which has always been a flexible program, which has always been a selection from a menu, they have not gone over that line in this case.

Finally, Mr. Moran indicates his surprise that we are suggesting there is an imposition of a notice requirement on anybody else proposing an alternative method and I didn't mean to be taken at quite that strength of argument.

We are simply noting there is an evidentiary burden to be met to support any approval,

1	and the Act sets that out and it would apply no matter
2	who proposes. The Board has obviously an obligation to
3	satisfy itself of what is in the best interest of the
4	public and there can be no less burden on anybody else
5	who proposes something than on the proponent.
6	We are also noting a possible notice
7	constraint and a possible natural justice constraint
8	that any party who seeks approval, and that's the
9	important distinction, as opposed to suggests a
10	preferred method as a reason for dismissal that they
11	may face. And that depends on the nature of their
12	option. If the option they are offering was not on
13	Hydro's initial menu, then it is likely all we are
14	suggesting is it's likely that some of those
15	constraints would apply.
16	And those are my submissions, Mr.
17	Chairman.
18	THE CHAIRMAN: Thank you, Mr. Poch.
19	Mr. Shepherd.
20	REPLY BY MR. SHEPHERD:
21	Mr. Chairman, Ms. Patterson, Dr. Connell,
22	in my main submissions yesterday I chose not to reply
23	to the comments of any of those who had proceeded me

and as a result I saved them all up; but happily my

friends have managed to deal with most of them so  ${\tt I}$ 

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1 have only a couple left.

project assessment.

- 2 I am also leaving to my friend Mr.
- 3 Campbell for Hydro to deal with the submissions of Mr.
- Rosenberg, aside from one comment. 4
- 5 Mr. Kelsey has talked about the timber
- 6 management case and my friend Ms. Kleer has sought to
- 7 distinguish the timber management case because it was a
- . 8 class EA. With respect to both of their comments, I
- 9 disagree.

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The essence of Mr. Jeffrey's reasoning in 11 that case was that the absolute freedom previously 12 granted to proponents to control the interpretation of 13 the undertaking was inappropriate in the class EA context because it is a structurally and conceptually 14 15 different type of hearing. Unless I am mistaken, we 16 have here a structurally and conceptually different 17 type of hearing as well and one that is much closer

conceptually to a class EA than to a conventional

And in this respect, I am in total agreement with my friend Mr. Hunter. I commend the reasoning in the timber management case. I believe that a fair reading of that will convince you that it is almost on all-fours with what we are dealing with here.

1	A second, I guess, technical question
2	that has been raised is the question of whether any
3	undertaking can be defined as the requirement and
4	rationale of something. As you know, that issue is at
5	the heart of our technical analysis in our written
6	submissions.

Dr. Connell, with respect, you asked my friend Mr. Mattson exactly the right question yesterday: Does a request to approve the requirement and rationale for an activity equate to a request to approve the activity itself? And perhaps I can add my comment to that.

If you accept that dropping out the words "requirement and rationale" in the approvals produces no change in the result in what is being asked for, then I believe you are left in the legal box I alluded to yesterday; that is to say, then you are approving the project.

On the other hand, if the words
"requirements and rationale" in the approvals means
something, we are back into the main technical
submission we made in writing. Hydro's requirement and
rationale is the DSP. It is in their words an
integrated plan; therefore, approval of requirement and
rationale is approval of the DSP.

1	Now on this point my friend Ms. Kleer
2	says that this Board cannot grant approvals for
3	requirement and rationale. And in support of that
4	proposition, she refers to the wording of 12(2)(d) that
5	this Board can grant approval to proceed with the
6	undertaking, which may perhaps be an elegant drafting,
. 7	and she says you can't proceed with a requirement and
8	rationale, so the undertaking can't be a requirement
9	and rationale.
10	I hasten to point out that in our
11	analysis, requirement and rationale is equivalent to
12	the DSP in any case and you can indeed proceed with the
13	DSP. I don't think that's in dispute. Ms. Kleer
14	appears to be assuming a somewhat narrower view of what
15	requirement and rationale is and she says the opposite.
16	Let's be clear on the impact of her proposed
17	interpretation. The essence of a so-called planning
18	hearing is that it deals with requirement and
19 .	rationale.
20	If we accept my friend's submission, then
21	how can we have planning hearings at all?
22	You can never have a hearing that just
23	deals with requirement and rationale. Every hearing
24	must ultimately approve some action on the part of the

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proponent and no hearing can be restricted to a

1	planning level approval.
2	[4:15 p.m.]
3	It seems to me that it is not realistic
4	to hang such an unacceptable and far-reaching result or
5	the drafter's unfortunate choice of ambiguous words.
6	I said I would deal briefly with Mr.
7	Rosenberg's submissions. He says that this Board is
8	only seized with the undertaking referred to it by the
9	Minister, but he didn't actually look at or refer you
10	to the reference from the Minister, and I would like
11	to.
12	I have provided copies to the Board for
13	convenience and I have copies here if anybody wants to
14	refresh their memory. What it says is:
15	Re An environmental assessment
16	received from Ontario Hydro for the
17	Demand/Supply Plan.
18	It doesn't say for some components. It
19	doesn't say for some program. What has been referred
20	to you, what you are seized of, Mr. Rosenberg is quite
21	right, you get your power from what the Minister gives
22	you. What the Minister has given you is the
23	Demand/Supply Plan.
24	This Board now being seized with it, is
25	faced judicially - I hate to make this technical

argument but I am responding to a technical argument 
is seized with what it was given. Two things can

happen: The proponent can withdraw that and say, we

take it all back. And as far as I have heard, the

proponent has not withdrawn the DSP, as best I can

understand.

The Board is now left with no jurisdictional choice, it must proceed with what it was instructed to do by the Minister which is to hold a hearing on the Demand/Supply Plan. Now let me move away from the technical analysis, I have a couple of general comments.

propose to put tight restrictions on the freedom of the proponent once the undertaking has been filed with the Minister. And looked at narrowly, I have to admit that some of his arguments and some of the arguments of others seem quite sensible. However, I agree with Mr. Poch, you must step back and look at those arguments and those submission from a broader perspective.

The necessary result of those submissions of that analysis of the Act is that the proponent cannot respond constructively to, cannot be persuaded by, the government review, the public review, the evidence in the hearing. It cannot continue its own

1	internal work and come up with better answers than
2	before. It can't respond to changing external
3	circumstances unless it specifically contemplated those
4	possible circumstances in the original undertaking.
5	In effect, even if the proponent is
6	convinced that aspects of its previous approach were
7	incorrect or are no longer applicable, it not only has
8	to keep quiet about it, it must actively support its
9	former positions that it no longer believes in.
10	This is made more absurd when we realize
11	that, on the submissions of those taking this position,
12	the other parties to this hearing can raise those
13	alternative approaches and this Board can adopt them as
14	being appropriate. But during that debate, the
15	proponent is in, as someone on the Panel said, a
16	strait-jacket and can never admit that it was wrong.
17	My friend Mr. Mark also has little time
18	for our appeal to look at the task that we undertook at
19	the outset. He says, the law is the law, and if the
20	law says the hearing is over, then - and I will use the
21	vernacular and I don't mean to pejorative - then the
22	public be dammed.
23	Well, with respect, he and I may have
24	fundamentally different views of how our legal system

works. I always thought that statutory interpretation

1	is about defining and implementing the object in the
2	spirit of the legislation and I believe that the
3	Interpretation Act supports that approach. The object
4	and spirit of the Environmental Assessment Act is the
5	betterment of the people of Ontario. In our view, any
6	interpretation of the Act that is not consistent with
7	that goal is simply wrong ab initio and no parsing of
8	the words in the Act can save it.
9	Finally, there have been a number of
0	comments on the time frame associated with the
1	undertaking. On this I take issue with Mr. Power and
2	Mr. Heintzman for different reasons.
3	Mr. Power would like to have a blueprint
4	he says, that survives presumably until sometime
5	however far in the future, is in his mind. I agree
6	with Mr. Moran, that's not the real world.
7	Given what we have said to date, it seems
8	self-evident that the specifics of the decision of this
9	Board will have a limited shelf life before needing to
0	be updated in some sort of review process, and in fact

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We are not building a nuclear station here where, as we have seen, one draws up the blueprints and then charges ahead come hell or high

of debate in these hearings, I suspect.

the details of that review process will be a key area

- water. Planning is a dynamic and a subtle process.
- 2 This Board will be establishing a
- foundation of information, a record, an analysis and it
- 4 will nudge electricity planning in a particular
- 5 direction. Future debate will build on that foundation
- and in the process produce further incremental changes
- 7 of direction.
- 8 So I fear it's impossible for my friend
- 9 to get his blueprint. What he should get is a
- foundation, a direction and a process. And frankly, I
- 11 think that is a better result anyway.
- My friend, Mr. Heintzman, on the other
- hand is insistent that a 25-year plan has been tabled
- and 25-year plan we shall have. This position misses
- an important distinction. Whether, and if so how, we
- plan for a 25-year time frame is a live issue in these
- 17 hearings. As well, whether and if so how, the shorter
- 18 five-year commitment time frame should be used is an
- 19 equally contentious issue. Some will argue that both
- 20 planning and action must be limited to a shorter term.
- Others will argue for a long-term approach on both
- 22 counts. Still others will focus on the distinction
- 23 between planning, with a longer time frame, and
- 24 commitments to action with a shorter time frame. This
- 25 Board will necessarily have to come to grips with what

is the best approach or what combination is the best approach.

What flows from that, I think, is something that there hasn't been a lot of talk about, at least not in this hearing room. All of us from time to time in this hearing have noted how much we are not talking about the environment. The reason: For the major supply options from which most of the key environmental issues arise, we have been debating those issues with our backs against the wall. The pressure of action decisions has forced us, sometimes in an almost unseemly way to emphasize economics and reliability instead of the environment. People have said - my notes say Hydro has said but that is probably not fair - people have said yes there are environmental concerns but do you want the lights to go out.

Well, if there is a significant impact of the DSP Update it is this: The Sword of Damocles has in effect been stayed. Now we can make this into more of a real environmental assessment hearing in which the real environmental issues can be debated properly and this Board has the practical freedom to reach thoughtful and subtle long-term decisions on the environmental impacts and therefore on the priorities of competing options.

1	As we have noted in more detail in our
2	written submissions where we have given quite a number
3	of examples of how that works, this is, in our view,
4	the biggest practical impact of the DSP Update. It is
5	not a legal change, it is practical change. A change
6	in focus and emphasize rather than a change in what is
7	being debated.
8	I might add that does not change our
9	basic position. The public hired us to accomplish a
10	certain task and now we have to deliver.
11	Those are our submissions. Thank you.
12	THE CHAIRMAN: Thank you, Mr. Shepherd.
13	Mr. Power?
14	MR. POWER: Thank you, Mr. Chairman.
15	REPLY BY MR. POWER:
16	I just have four brief points.
17	My first comment is with respect to Ms.
18	Patterson and an answer I gave to you yesterday which I
19	now wish to correct. In light of what I realized when
20	I stated, when you asked me about whether or not this
21	Board could dismiss this hearing on a non-suit if that
22	was appropriate. I agree it is appropriate and I guess
23	my mind was elsewhere at the time. I apologize for
24	that. So there is no debate over something that is not
25	debatable.

1	With respect to Mr. Shepherd's comments
2	that I appear to be seeking a blueprint which remains
3	fixed for 25 years, my client is not suggesting that at
4	all.
5	They are suggesting we should have a
6	foundation which we believe we can build on for 25
7	years unless there is a substantial need for change, at
8	which time Hydro can come back in that intervening time
9	period to seek the change that's required. But we
0 ·	should at least have some sort of a plan, some sort of
1	direction. However, I am not of the view that it has
2	to be fixed for 25 years. It can certainly be amended
3	at a later date by a further Board decision.
4	My third comment is with respect to the
5	issue of Section 17(A) and whether or not Hydro can
6	rely on that to amend the undertaking while it is
7	before the Board.
8	In my view Hydro cannot rely on that
9	provision. But regardless of whether I am right or
0	not, assuming I am wrong, Hydro then has to adhere to
1	the test within Section 17(A) for amending the
2	undertaking, and that test is whether the change to the
3	undertaking conforms with the environmental assessment
4	originally submitted to the Minister.

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I would suggest to you that the changes

1	in the Update do not conform to the original
2	environmental assessment and upon some of the bases
3	that have been discussed earlier, namely the new focus
4	on the median forecast which is now being considered,
5	the life extensions to the fossil stations and a few
6	other matters.

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That all brings me up to, I think, the one thought I want to leave you with, is the issue of the jurisdiction of the Board.

If the Board concludes that either Hydro does not have the jurisdiction to change the undertaking or Hydro does have the jurisdiction to change in accordance with Section 17, but has failed to comply with Section 17, I would suggest that there are two options available to the Board, besides the proponent withdrawing the Update. I would suggest that the Board could reach a conclusion that Ontario Hydro has de facto withdrawn from this hearing because it has withdrawn its original undertaking and because the Board does not have the jurisdiction to accept the new undertaking.

Alternatively, and I would suggest that this is the better option, the Board may come back and inform Ontario Hydro that the Board does not have jurisdiction to consider the changes in the Update,

1	therefore the Board will inform Hydro that the hearing
2	may continue as Hydro wants but on the basis of
3	Demand/Supply Plan and not on the Update. The
4	proponent will then know what approvals it may receive
5	from this Board or may not upfront, and the proponent
6	therefore has the option of deciding whether it wants
7	to continue with the hearing on the same basis it
8	started out with or whether it wants to end the
9	hearing.
10	I would suggest that this is the more
il	appropriate choice, or the more appropriate decision
12	that you may reach, and it is the best choice in the
13	interests of the public and it is a way of rectifying
14	this hearing and finding out clearly what Hydro wants
15	to do.
16	Those are all my comments.
17	THE CHAIRMAN: Thank you, Mr. Power.
18	Mr. Rodger?
19	MR. RODGER: Thank you, Mr. Chairman.
20	REPLY BY MR. RODGER:
21	I have four reply comments. The first is
22	it with respect to submissions of Mr. Poch when he was
23	describing what is the undertaking. It seemed to me
24	that his entire argument was based on one key concept,
25	and that was that the program equalled the undertaking,

1	and the program itself was the approval Hydro currently
2	seeks for specific amounts of specific technologies.
3	When I heard that I was hoping that the
4	Board would ask Mr. Poch to explain pages 19-3 and 19-4
5 .	of Exhibit 3. You recall Mr. Bullock referred to that,
6	where there is descriptions of one alternate method of
7	carrying out the undertaking is the programs associated
8	with Plan 22, Plan 15. The program is one way to carry
9	out the undertaking but not the undertaking itself. So
LO	I would ask you to keep that in your minds when you are
11	weighing Mr. Poch's comment.
L2	Now, to the nature of the hearing.
13	Again, Mr. Poch stated that this hearing is about
L 4	approvals for specific amounts of specific options.
L5	And I suggest to you that this is not the position that
16	Mr. Poch's client took when the hearings began. And if
L7	I could refer briefly to Volume 2, and I will just read
L8	the comments, this is from Mr. Poch's opening
19	statement.
20	Remembering what he said about this
21	hearing's specific options, specific technologies, he
22	said at Volume 2, page 214:
23	This hearing isn't about one
24	generating plant or a transmission line.
25	This is a 25-year plan which will

1	encourage a whole style and forum of
2	energy system development.
3	He goes on to say on line 18:
4	This plan is a plan to spend some \$200
5	billion perpetuating an approach
6	that is really threatening both our lives
7	and our environment. It's difficult to
8	grasp the scale we are talking about but
9	we must.
10	I would suggest to you that that is very
11	different from what Mr. Poch said yesterday, that all
12	this hearing is about is the formal approvals that
13	Ontario Hydro currently seeks.
14	Now, with respect to the significance of
15	the formal approvals that Ontario Hydro is currently
16	seeking, I would like to respond to some of Mr.
17	Mattson's comments on behalf of Energy Probe. Mr.
18	Mattson stated that the Board should only rule on the
19	request for approvals that Ontario Hydro is currently
20	putting forth in the Update.
21	And while AMPCO urges you to reject those
22	arguments for the reasons we have put in our written
23	submissions, let's just assume for the moment that that
24	argument was correct. Then I would put to the Board,
25	what does that do to Energy Probe's case of leading

1	evidence with respect to privatisation? And, surely,
2	if the Board's decision is going to be restricted to
3	the formal approvals that Hydro has put forth, then
4	that privatisation evidence, that is also now
5	restricted to the formal approvals. That is the only
6	relevant evidence that Energy Probe can bring forth
7	would be on privatising that range of hydraulic or
8	privatising the new radial transmission lines to
9	incorporate the Manitoba Purchase.

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Now, I have no doubt that if the Board ruled that, then Mr. Mattson would be up here again saying, no, no, the Board's decision must be restricted to the very narrow confines of the formal approvals but as far as Energy Probe's evidence on privatisation, that can still be very, very broad and very general. And my friend can't have it both ways. We can't have the Board's decision being narrowing construed and yet the evidence that intervenors want to bring forth to be very broad.

Finally, with respect to the 25-year period in connection with the Demand/Supply Plan. Both Mr. Shepherd and the Government seem to give the indication that a 25-year planning horizon was just unreasonable, that we just can't make decisions based on that long time frame. And while we certainly can't

2	long-term planning decisions are made each and every
3	day. And as one example I would ask you to look at
4	AMPCO's members in the industrial sector. When an
5	AMPCO member decides to open up a mine or build a
6	refinery or build an automobile manufacturing
7	operation, they are not looking to five years down the
8	road. They are making a business decision that's going
9	to last 20, 30, 40 years or more.
10	I would ask you to take into account in
11	your analysis of what this hearing is about, that you
12	also factor in the decision of business confidence. By
13	that I mean what signal would it give to the business
14	community of Ontario if this Board were to adopt the
15	argument put forth by some that all this hearing is
16	about is a five-year time line, that the Board is
17	unwilling to go beyond that period of time, when

see into the future, I suggest to you that those

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every day. I suggest to you that if you did accept that short-term approach, then it would create more uncertainty and less confidence in Ontario as a place to conduct business. I would ask you to also take that into your considerations with respect to this matter.

business has to make those long-term decisions each and

Those are my submissions.

THE CHAIRMAN: Thank you, Mr. Rodger.

1	Mr. Heintzman?
2	REPLY BY MR. HEINTZMAN:
3	Mr. Chairman, Members of the Board, I
4	have about five points.
5	The first point relates to some
6	submissions made that because the Update is a more
7	restrictive, as some persons have said, document than
8	the DSP, that that makes it less of a change than if it
9	were a more inclusive document. I believe that Dr.
.0	Connell's examination on that point of some of the
.1	counsel disproves that.
.2	I would suggest to you that building a
.3	pipeline from Toronto to Barrie is a different project
. 4	than building a pipeline from of Toronto to Huntsville,
. 5	or are from building a pipeline from Toronto to North
.6	Bay. They are different projects. But if the project
.7	is to supply gas to customers in central Ontario, they
.8	are all methods of accomplishing the same undertaking,
.9	and that's the distinction that's being brought before
20	you today.
21	The facilities themselves cannot be the
22	undertaking. By definition under the Act the
23	facilities themselves cannot be the undertaking.

no other method of accomplishing that undertaking. And

Because if they are the undertaking then there can be

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- the Act therefore mandates that it is the activity or
  the enterprise, as Section 10 says, which is the
  undertaking, not the facilities themselves.
- 4 [4:37 p.m.]

And you must approach the proposal before you, the undertaking before you, with that definitional restriction. It cannot be the facilities themselves otherwise there cannot be any alternative. Or putting it another way, if the undertaking is Plan 15, then necessarily Plans 22 and 24 and 23 are alternative undertakings.

As we have heard from Hydro that is not their intent and that is not what the document says, so the facilities to be approved in the document cannot be the undertaking. It is the enterprise that is the undertaking.

In my respectful submission, the words, and I am quoting from page 19-1, "The program is made up of specific demand/supply components." It means the program is made up of specific methods. That is what the document says and it then tells you the methods that Hydro is proposing. And it is up to you to decide whether some or all of those method are appropriate. But it does not make the specific components into the undertaking.

Τ	I submit that it is not open to this
2	Board to approach it on the basis that the facilities
3	themselves are the undertaking. The Joint Board and
4	Regional Municipality of Ottawa-Carleton case is almost
5	on all-fours with this case, where Hydro proposed
6	alternatives and the Divisional Court and the Court of
7	Appeal approached the matter on the basis of the
8	enterprise or the activity being the undertaking, not
9	the particular facilities recommended by Hydro.
10	But more particularly, this Board as was
11	just pointed out, said in the intervenor funding case
12	dealing with Energy Probe - and this was quoted by the
13	Divisional Court - this Board said:
14	Ontario Hydro has the statutory
15	mandate and obligation to supply the
16	electricity needs of the people of
17	Ontario. To carry out that mandate and
18	obligation, it has prepared a plan.
19	The plan is the undertaking, which is the
20	subject matter of this hearing. That's what this
21	tribunal said. And in reliance upon that, the
22	Divisional Court said in a decision binding upon this
23	tribunal, and it was the ratio decidendi of their case
24	because Energy Probe was saying we want to bring
25	something before the tribunal that is a different

1	method or a different undertaking that they should at
2	least consider, namely, privatisation.
3	And after referring to this Board's
4	statement said:
5	The Board has a most difficult task to
6	perform. It is not the environmental
7	impact of a particular project that is
8	being assessed, but rather a wide-ranging
9	and far-reaching plan dealing with all of
10	the variables associated with a projected
11	supply of electricity for this province
12	over the next quarter of a century.
13	Now that decision in my respectful
14	decision is binding upon this tribunal upon this
15	Tribunal and this Tribunal cannot define the
16	undertaking in any different way. The tribunal itself
17	was a party to that proceeding as were most of the
18	parties who are making submissions to you today.
19	Just a few final comments. Mr. Mark
20	indicated that I said that Ontario Hydro should have
21	four weeks to deliver the materials. What I think I
22	said was we would like to see the materials
23	immediately. There should be four weeks to determine
24	whether we can proceed. If the materials are
25	relatively perfunctory, then I would submit that we can

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1 proceed. If the materials, having received them, we 2 think are not perfunctory, then we should come back to 3 you and ask for more time than four weeks from the 4 receipt of the materials. 5 THE CHAIRMAN: Sorry, we start earlier if 6 they are perfunctory, but later if they are not 7 perfunctory? 8 MR. HEINTZMAN: Exactly. If Ontario 9 Hydro comes up with a great deal of planning material, 10 then speaking for Atomic Energy we will require more 11 time to be prepared for Panel 10 than if the materials 12 are relatively perfunctory. 13 One point that some intervenors have 14 made, and I think Mr. Howard may have, is that the environmental assessment can be a 25-year environmental 15 16 assessment, but that the undertaking may be of a 17 different period. 18 Now, Mr. Chairman, and Members of the 19 Board, if you read Section 5, that cannot follow. The 20 undertaking and the assessment have to be of the same 21 thing. In my submission, you cannot have a 25-year 22 undertaking and a 20- or 15-year assessment and you 23 can't have a 25-year assessment and a 10- or 15-year 24

undertaking.

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My final point is Ms. Kleer says that an Farr & Associates Reporting, Inc.

1 intervenor could not convince you to proceed with Plan 2 15. Well, the Divisional Court and Court of Appeal in the Joint Board and Regional Municipality of 3 4 Ottawa-Carleton said exactly that we could at page 399 5 of the Ontario Reports which you have. 6 Those are my submissions. 7 THE CHAIRMAN: Thank you, Mr. Heintzman. Before I ask Mr. Campbell, is there 8 9 anybody else? 10 Mr. Campbell. 11 REPLY BY MR. B. CAMPBELL: 12 Thank you, Mr. Chairman. I think I am 13 going to be spending the bulk of my time in front of 14 you pointing out that all kinds of things that people have said we said, we didn't say; and to the extent 15 that all those arguments are based on things we didn't 16 17 say, we say that all those arguments fail. Now, let me start with a few examples. 18 19 We didn't say there is no change to this matter. We 20 were quite explicit. What did we say? That's what I 21 think you should pay attention to. What we said was that we submit the application before the Board, 22 although changed, has not changed to such a degree as 23 to require the hearing to be terminated. You heard 24

from Mr. Howard that the test, the judicially laid-down

test for that is that it is something entirely
different in nature. That's the test. We say we pass
that test. But we never said there is no change.

Secondly, I cannot understand why people are saying that Exhibit 452 stands alone. I have immediately lost my copy but let me find it. It says on the one hand we have Exhibit 452 and on the other hand we have Exhibit 3. Well, I'm sorry, that's just a wrong characterization.

What we have in Exhibit 452 builds on the material that is before you. Section 4 dealing with non-utility generation aspects in Exhibit 452 consists of approximately seven lines and what it refers to is all the evidence on Panel 4 -- no, the non-utility generation has Panel 5. Yes, what we have is -- and then we have in the previous, we have two pages - hold them up - two pages Exhibit 452. That is all the evidence in 452 discussing the demand management plan and it refers to all of the evidence called on Panel 4.

So what we have here is we have a mountain of evidence of which this is a piece down somewhere near the bottom and to which we have added a small increment to the top. It is a significant increment but it is not large. It builds on everything before you. That is what we have.

	So this nonsense about these two things	,
standing	in juxtaposition in opposition to each other	
is in my	submission, just as I characterized it,	
nonsense	•	

Now the MEA in particular, but several of the other people making submissions, have made a number of propositions that again we say are just wrong. The MEA starts out with the proposition that — really they have stated it two different ways: The undertaking includes the strategy; the undertaking includes the plan. It does not. Everyone who has stood before you has said the court has made it clear it is up to the proponent to define the undertaking and only the proponent can do that.

And then they all immediately ignore that proposition. Well, the proposition means something.

And the undertaking is defined in Exhibit 3 and it is defined at page 19-1, so often referred to. It is described: The undertaking is made up of specific

Demand/Supply Plan components. It's not just any old components then, but the book tells you what components are included in all of this. It is made up of specific Demand/Supply Plan components. It is not everything that Hydro will be doing for 25 years. It is not all of the elements of the Demand/Supply Plan. It is not

1	even all of the supply elements of the Demand/Supply
2	Plan.
3	The next paragraph, Mr. Chairman, that
4	you so often have referred to says "The program
5	submitted for approval represents only part
6	THE CHAIRMAN: You have missed out part
7	of it. You have missed a whole sentence.
8	MR. B. CAMPBELL: Well, the sentence
9	about it being made up of specific Demand/Supply Plan
10	components and it constitutes a capital P, the Program,
11	the defined Program. It constitutes a program in
12	respect of activities associated with meeting future
13	electricity requirements.
14	It then continues to say the program
15	submitted for approval represents only a part; that is,
16	the program is only a part of the bigger picture that
17	we are talking about in the Environmental Assessment.

I mean Mr. Mattson has it exactly right. There is an environmental assessment that responds to Mr.

Shepherd's concern about having a broad look at the planning process, and then there is approval to proceed with the undertaking.

The undertaking is a defined term. It is defined as only part of the results of the integrated planning. And I'm sorry, but we have the right to

L	derine what part we want approved, and the way we did
2	that was we said this is a planning approval. No
3	planning approval can last forever. It is silly to
4	think of a perfect blueprint for 25 years. It's
5	probably good for about five years from the end of this
5	hearing. Yes. At the time the document was being
7	written, it seemed a little inconceivable to us that it
3	could extend beyond the many years that were already
e	contemplated in setting that '96 date but it has with
)	the principle I have told you throughout - Mr. Poch has
1	quoted it back in the transcript to me - was the five
2	years from the date of the approvals. That's about how
3	long the outside edge of how long we think that's
4	reasonable to rely on planning approvals.

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And we have been very specific about that part, only part, of the components of the integrated plan that we see as the Program. And that's our right to define it that way. Everybody has sort of tugged their forelock, which I don't even have one, to this principle and then consistently ignored it. Well, I'm sorry, it's there in the judicial decision and we rely on it.

Now moving beyond that page, what you are talking about here and, you know, this definition of the undertaking fits perfectly the definition of

undertaking under the Act. It is a program in respect
of activities and then we go on to say it is only part
of the big picture, but it's a program in respect of
activities. That is what is said in the definition of
undertaking under the Environmental Assessment Act.

And then if you turn the page, what you find according to the MOE guidelines just what you should find, you find a description of the proponent's preferred method of carrying out the undertaking. The planning at that time resulted in that being the preferred method of carrying out the undertaking.

That's the approval that we are looking for.

You turn the next page. You will see quite specifically that another alternative method of carrying out the undertaking is that associated -- and there is another set of facilities laid out. So in my submission the way this has been laid out is entirely consistent with the Act. Progresses from the environmental assessment, which incorporate all the analysis, the forecast, the methodology considerations. That's all the environmental assessment which the Act says, you don't approve that; you accept it. You accept it and again to use the MOE guidelines kind of language, you accept it for purposes of making your decision under 12(2)(d) on whether approval should be

1 granted to proceed with the undertaking and whether 2 that approval should be given subject to terms and 3 conditions. So when we are talking about approvals 4 5 here, there has to be some sense that the lawyers should be careful about using the language. It's 6 7 approval to proceed with the undertaking. It's a defined undertaking, broad planning considerations go 8 to issues relating to the acceptance of the 9 10 environmental assessment. Dr. Connell, I want to come back 11 12 specifically to this question of the use of the words "requirement and rationale" within the listings that 13 14 are contained starting at pages 19-2. 15 Mr. Shepherd has put his finger on the 16 problem, although I disagree with his result. He sees 17 two extreme solutions. I say we are somewhere in the middle. Mr. Shepherd has pointed out that you can't 18 19 just erase those words out of there because if you do, 20 what the approval would read is that we have approval to do these things, to actually get out there, rev up 21 22 the bulldozer and build those suckers. We didn't ask 23 for that and we don't want it. We want to go through a project 24

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environmental assessment. It's what we say in the

1	book. I can't understand why people don't read it.
2	That's what we want to do. So we were faced with a
3	problem. We had to put some words in there that
4	captured all of that stuff that has to do with the
5	acceptance of the environmental assessment, the
6	planning methodology, all of those things. They come
7	down for us we are not doing this because we sort of
8	like to spend our weekends doing this. We are doing
9	this because we want a result, a planning result.

And we needed some words to give us that middle ground between approval to actually do the thing, which isn't what we are asking for, and the fact that we needed to carry into the next hearing, where we would be looking for that approval, an approval of the results of the planning.

And we said to ourselves, what are the words that sort of capture the essence of the results of planning? How do you characterize that? It is not easy. And what we finally said was, in essence, the results of the planning process — the planning process itself is not part of this undertaking, but the results of the planning process can be captured in the words "requirement and rationale".

If you say yes, you have got an approval for the requirement and rationale. That's that

intermediate point where the planning result is there
and you are carrying it forward to the next hearing.

And again Mr. Mattson had it exactly right. Those
words look forward to what you will carry to the next
hearing under the way this is being done. We won't

have to revisit those planning results.

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there.

So in my submission there has to be some
kind of set of words in there for the precise reason
that Mr. Shepherd pointed out. If there aren't, then
you read the approval and you would think we could
starts the bulldozers. Well, that's wrong. It is not
what we are asking for. There has to be some words in

14 Now, we could sit here and argue whether 15 this word or this nuance or that is perfect. That's 16 what it's aimed at. It's aimed at how do you capture 17 this sense that the results of the planning that you 18 want to carry forward as a basis for your next 19 application is what you are seeking approval of? Now, 20 we thought it was clear. Quite frankly I still think 21 it's clear. I think there has been a lot of smoke here 22 for no good reason, but that is what we want to take 23 forward: approval of the planning results that come out of acceptance of the environmental assessment. 24 25 [5:00 p.m.]

1	And I think that that progression from
2	the environmental assessment through to the
3	undertaking, through to the preferred method of
4	carrying out the undertaking, through to the
5	alternative methods of carrying out the undertaking is
6	quite consistent with the development of that range of
7	jurisdiction, the range of jurisprudence and Board
8	decisions that have surrounded that issue ever since
9	this Act was passed.
10	This has been, the kind of conceptually
11	walking through that process, has been the single issue
12	that I think has occupied most time in any part of the
13	interpretation of this Act. It's that progression
14	through.
15	But in our submission, the way it's laid
16	out, it's simple, it's consistent with the Act and it
17	makes sense.
18	Now, with that little diversion I want to
19	continue with the things we haven't been saying.
20	Everybody is saying, and let me give you
21	an example. This planning to the upper, you know, it's
22	interesting. You go to the strategy document, what are
23	the five main points? You don't see planning to the
24	upper in the five main points. What you see are
25	priorities for options. Those are the five strategic

1 trusts if you turn to the first page of Exhibit 74. There are then a set, a range and set of principles 2 3 that are set out in that document and there is some 4 discussion of them. 5 We have pointed in our submissions to 6 strategy element 2 - we are getting pretty far into it 7 here - we are 2.2.4, we pointed it out on paragraph 10 8 on page 2 of our submissions. Now, what we say is that 9 the people who have put to you the proposition that 10 there is some enormous change here are making the 11 classic planning mistake. What they are saying to you 12 is that if you have got a broad strategic guidance, 13 well, there is only one way to achieve the objective in 14 implementing that strategy. Well, I'm sorry, that's 15 not the real world. 16 The objectives are discussed in page 32 17 of Exhibit 74. I invite you to read it. I am not 18 going to take the time to read you a page of prose 19 there, but there is a page of prose that sets out what 20 the objectives are, what its intended to achieve. And it's the achievement of those objectives that are 21 important and how you do that, how you do that will 22 23 change depending on the circumstances. 24 All the Update says is:

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circumstances have changed and how we are meeting the

1 objectives of covering that range of load growth, we 2 are taking a little different approach. We are not 3 saying forget the upper. We are saying we are coming at this question a little differently in light of 4 today's circumstances, and they are the same 5 6 circumstances we have been telling you about throughout 7 the course of this hearing. 8 Updated load forecast, Mr. Burke under 9 some considerable pressure from my friend from MEA corrected his bandwidth methodology. That's in the 10 11 evidence. 12 What is the next panel? What was Panel 13 2? Existing system? I'll come to this, which I am 14 sure is related to the fossil life extension, I will 15 come to that in a moment. 16 3 went through the issues. 17 4, we made a big change in our estimate 18 of what we could get from demand management. 19 5 we treated NUGs differently. 20 They are changes of circumstances that we 21 have to react to and we have done so consistently 22 throughout. 23 When we brought in these changes, people 24 have been beating on us like crazy to get this Update

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out. So we gave them the results and now we are

1	tidying up and getting the information out to them and
2	now they are complaining, well, you shouldn't have sent
3	it out until you had the information. Well, we were
4	asked to get it out quickly, we did so. We are now
5	doing what we were asked to which is get out the
6	supporting information. We are answering
7	interrogatories.
8	All of this, all of this in my submission
9	requires some consistency over the course of this
10	hearing, and these people can't have it both ways. We
11	are not trying to. We have said we are going to
12	discuss this Update on Panel 10. We will subject
13	ourselves to as much cross-examination as this Board
14	will permit, which is considerable. We will do all
15	that. I'm not saving anything.

But planning to the upper, read the book.

The book doesn't say you have got to staple this

principle and never implement it except in some

specified way. We implemented it in a certain way in

1989, when it didn't matter if you took the upper or

the median, you still needed big new supply just after

the turn of the century. Median, upper, didn't matter.

Now we are in the situation where if you

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go gang busters along in the upper, you are doing

something that your highest probability says is now

1	going to be ten years later. Instead of those things
2	being like this, stacked right up on top of each other
3	they are ten years apart now. I'm sorry. It makes a
4	different.
5	People wanted to know what the difference
6	was, we told them. That's all it is.
7	Next item. Notice.
8	Mr. Mark takes a look at the notice and
9	he takes a look at page 1 like that was the end.
0	Now first of all, look at the items at
1	the bottom that are listed. Each alternative
2	Demand/Supply Plan includes, and he goes down and he
3	says, well, it doesn't include fossil or nuclear
4	generation. That's wrong.
5	The updated plan, he says the updated
6	plan doesn't have that in it. Well, I'm sorry. If I
7	go to page 26 of this, I see graphs going out to 2014,
8	let's say, if you go fossil, if you go nuclear. I see
9	graphs if you go to page 24 that for the updated plan
0	starting in 2009, 2010 have a wedge of new nuclear or
1	fossil. All those elements are still there. He's not
2	right when he says they are aren't there. They are
3	part of the updated plan.
4	We say we don't need to make decisions

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about them now. Planning to the upper has been being

1	characterized by others as just-in-time
2	decision-making. We say we don't need decisions about
3	them now and when it comes time to make them, we will
4	make them.
5	That's far more consistent with the
6	objectives that is set out in the discussion of
7	planning to the upper and that's what we have done.
8	And what Mr. Mark conveniently doesn't do
9	is turn the page on the notice. It doesn't stop at the
10	bottom of page 1; it continues.
11	It says, the approval is with respect to
12	transmission, requirement and rationale for
13	transmission, requirement and rationale for specified
14.	generation, transmission facilities, including nuclear,
15	fossil and hydraulic.
16	At the bottom of the page is says, the
17	purpose of the hearing is for the acceptance or
18	amendment and acceptance of the environmental
19	assessment.
20	If there is any amendment it's to the
21	environmental assessment and the Board has the perfect
22	jurisdiction to deal with that.
23	There are no surprises here. There might
24	be if you stopped reading. But the notice kind of goes
25	on for a bit.

1	And in the paper, the part under the
2	first page when it was published in the newspaper, it
3	wasn't blacked out. It was there and this is what it
4	says. You can't stop reading at the end of the first
5	page.
6	They say we have asked for some different
7	view. Everybody keeps saying we have asked you to do a
8	whole bunch of things that you wouldn't otherwise have
9	to do. We have asked you to give a view of nuclear or
10	a view of fossil.
11	Well, that's right, we would be
12	interested in a view, but what we have asked for, read
13	that list of questions on page 32. What it says is
14	matters under consideration by the EAB. The range of
15	questions that they will be asked to considered will be
16	illustrated and we have set out a list of questions.
17	What are those things?
18	There is not a question there that you
19	don't have to look at because of 12(2)(c), (d) and (e)
20	requirements and because of Section 5(3) requirements.
21	Mr. Moran is exactly right on that point.
22	All that is, is it's an indication. We
23	could have said they will have to consider the matters
24	that are relevant to section 12(2)(c), (d) and (e) and
25	Section 5(3) of the Act. We thought it might be a

- l little more helpful.
- These are the kind of things that the
- 3 Board will have to consider. There is nothing there
- 4 that isn't contemplated by the statutory requirements
- 5 that are placed upon you.
- 6 Fossil life extensions. The simple point
- 7 on fossil life extensions, which is I thought would
- 8 have been clear after Mr. Meehan's direct evidence on
- 9 Panel 8, is that with or without fossil life extensions
- 10 makes no difference to the approvals that we are
- ll looking for.
- 12 Mr. Meehan indicated in evidence, Volume
- 13 108, February 17th not that long ago, I would have
- 14 thought it could have been remembered page 18925 and
- 15 6 that the effective life extensions on the date for
- 16 new generation has, he indicated, that it would be
- 17 advanced by one year from 2009 to 2008 on that median
- 18 load growth. One year.
- 19 Exhibit 452 indicates that the longest
- 20 lead time option being considered is ten years. 2009.
- 21 Ten years is the longest lead time option that Hydro
- 22 feels is appropriate to consider at this time.
- 23 Therefore, even without fossil life extensions no major
- 24 supply approvals would be required within the next five
- 25 years.

1	As far as we are concerned, fossil life
2	extensions, we had a wedge at the end of the plan that
3	we had to look at, there has been a changed view of the
4	ability to fix that wedge with fossil life extensions,
5	and that has reduced the amount of new nuclear and
6	fossil base load supply that we have presumed in the
7	plan. But it hasn't changed the approvals that we are
8	asking for. That tradeoff at that point, at that back
9	end of the plan, has not changed the approvals we are
0	coming before you to seek.

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The reasons for that are set out in the Update. For most of that period we have a surplus.

Is my friend really saying that we should go along, go like crazy for approvals knowing that for much of the first part of the next century, the first beyond 2000, it tapers off to 2010, as set out in the Update. If you believe your highest probability act is the median, then looking at that you are saying, gee, we have got a lot of this upper side risk covered because we have got a surplus.

How much do you do for that little wedge at the top? That's what is behind the Update. That's what the thinking is all about and it will all be subject to full cross-examination on Panel 10.

But the fossil life extension argument

1	from my	friend	is,	in	my	submission,	an	entire	red
2	herring								

I think I have addressed the point, does the plan remain for 25 years? There seems to be some view around that the plan doesn't go out 25 years. The whole document, the Update document, the charts all go out 25 years. I don't understand how they can say this. They have got to specifically ignore the very document they are complaining about. Well, it's easy to criticize it if you are not going to read it. Read it. It's for 25 years.

The information being provided, I think I have addressed that. As I say, we were under great pressure to get the Update out, we encapsulated the results, got them out in order to facilitate people dealing with whatever problems arose because of it.

I stood in front of this Board and said, we are digging out the calculations that were done, we are writing them up, we are prepared to send them out.

Take the LMSTM results as an example.

Yes, we have sent out LMSTM results. My friend

complains, well, some of them are dated after the

Update. First, there is two reasons for that. One is

sometimes you push a button on the computer and say,

print this out for us, please, so we can send it, give

- them a nice clean copy, the computer puts a date on it.
- 2 It happens to be the current date. Some of that
- 3 happened.

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4 Now, if my friend just sort of instead of

saying we made it all up afterwards, had he had the

6 simple courtesy to inquire about the balance of it,

7 what he would have found was, you know, in the rush to

get this all done we made a mistake. There will be

9 evidence on this. We made a mistake.

The mistake was in putting together the resource tables that our LMSTM outputs, there was a switch in years as between Mattagami and Patten Post. A little switch. A little bit of change in energy, a little bit change in capacity. It doesn't affect the planning outcome of the process at all, but it affects the numbers that a computer inevitable chugs out. And it was decided in January that the thing would be run with the right little things, so that I wouldn't have to come here and say, well, the results would be different, how much different would they be. We said, okay, let's give Mattagami and Patten Post the right dates.

We are not talking 10,000 megawatts of generation here. We are talking minor adjustments to the dates for pieces of capacity. We decided, let's do

1	the run, get it exactly right, and that was done and
2	that's the LMSTM result for five cases that were sent
3	to these parties, including AECL. That's what has been
4	done.

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So if there is a little difference in date, you know, I would have thought by this point in the hearing, a little bit of, say, instead of sort of imputing malafedes, a little call could have been made. Is that so hard right now?

The risk analysis, my friend keeps referring to this risk analysis as if this is going to be really complicated and difficult to understand.

Look at what the words tell you. The words tell you that looked at broadly the expected costs of underplanning are comparable. Looked at broadly.

There was a broad calculation done.

Again. If my friend had picked up the phone he would know that the numbers on a page have had some prose attached to them to explain what the calculation does, we just didn't send out a page of number, we attach some prose to the calculation, and I think it is not in the mail today, it's going to be in the mail tomorrow.

It's an interrogatory that he sent us, we are answering it. We are doing the best we can at

1	getting the information out given that we were urged
2	that those results from that Update better be out as
3	quickly as possible. And so we are doing it. We are
4	doing exactly what we have always said we would do.
5	I am tempted to explain what the motion
6	on Timber was really all about. I argued it for the
7	Minister of the Environment. It was not about the
8	things that have been described to you today. It was
9	about a position taken by the proponent that in a Class
10	EA the approval could not impose terms and conditions
11	in respect of what the subsequent document that would
12	be filed under the Class EA should contain. The
13	Chairman of the Board at that point in time quite
14	properly said that's ridiculous. The whole Class EA
15	process is aimed at saying, here is a standardized
16	approach, that if you take this approach you can have a
17	Class EA approval for multiple undertakings that are
18	repetitive.
19	The proponent was resisting part of that
20	have notion. The chairman said, no, if it's going to
21	be a Class EA you have got to have something in there
22	that says this is what you expect to see in what is

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MNR doesn't happen to call it an ESR, but

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normally referred to as an ESR, environmental study

report, under a Class EA approval.

1	apart from the terminology, that's what it was all
2	about. It wasn't about any of these other things.
3	The Keele Valley case that's been
4	referred to by my friend, and I am not entirely clear
5	in support of what proposition, but it had something to
6	do with the balance of the evidence, listening to the
7	balance of the evidence, making a finding for an early
8	dismissal.
9	Let me tell you what happened in Keele
. 0	Valley, you might want to go back and actually
.1	understand the facts of the case.
.2	The facts of the case are that it was a
.3	phased hearing, the question of need was the first
. 4	phase. The Board made a point of saying that the
.5	motion for early dismissal was heard after all the
. 6	proponent's evidence had been heard on that phase, all
17	of the intervenors' evidence had been heard and after
.8	the proponent had had the opportunity to call reply
19	evidence on the very issues around which the motion for
20	early dismissal was focused.
21	That can be found at page 19 of the Joint
22	Board decision on the matter, that's dated May 4th,
23	1990.
24	You have got to understand too in the
25	case, the potential for change here wasn't just in some

1	estimates. One of the things that worried the Board
2	most was because the kinds of changes that we were to
3	be talking about was that this thing would be in fact
4	done, or the application would be taken over by an
5	entirely new proponent. It wouldn't even be the same
6	proponent who was in front of the Board. Now that
7	might be a change going to a difference in nature, a
8	whole new proponent, but that's not what we are dealing
9	with here and we are not dealing with anything close to
10	that.
11	[5:20 p.m.]
12	What the Court had to say the test
13	that the Court applied, and this is found at page 94 of
14	the decision on Keele Valley, which is 6 OR 3rd 88,
15	1992, 6 OR 3rd 1998 I'm sorry 1992. 6 OR 3rd 88.
16	The test that the Court applied on the
17	motion for nonsuit that having heard all of the
18	factual background is that they had heard all of the
19	evidence. And what the Court said under that
20	circumstance, even where they had heard all of the

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succeed no matter what evidence might come forward, then it could deal with the matter in that way. That's the test that they applied in this proceeding, and they

evidence, the Board also noted that when it was

satisfied that the application could not possibly

said	the	re	was	no er	cor	in appr	oad	ch or o	concl	lusions
reach	ned	bу	the	Board	or	manner	in	which	the	Board
exer	cise	ed i	its d	discre	tion	n.				

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So to the extent that there is a precedent for a procedure here, I say it operates entirely in favour of our position. The precedent of procedure here is that you hear — what we have said is you have at least got to hear Ontario Hydro's evidence. The precedent that this Board that has been explicitly approved of by the Court is not just our evidence but the evidence of all of the other parties and reply. That's the precedent that has been set.

It's a little easier to accomplish on specific issues in a phased hearing but I think it clearly supports our proposition that at least until you have heard our case, our Panel 10, which we -- people sort of say we haven't proposed to call, it's sort of like we have got to be forced to call evidence on the Update. We sent out a brief outline of evidence saying that we would be calling evidence on the Update. It's Panel 10. We have collapsed the back end of our case. Panel 10 is going to deal with the Update. We have sent it to everybody.

I get accused of not reading my mail because mostly I lose it, but, in fact, if they had

1	read	their	mail,	that's	exactly	what we	are going	to
2	do.	Panel	10 is	going	to deal v	with the	Update.	

And what I say is that if there is any principle to be derived from Keele Valley, it doesn't go in my friend's favour, it goes in favour of our position that in fact you have got to hear at least the end of our case.

Ms. Kleer earlier this afternoon made the point that those people that are characterizing your ability to attach terms and conditions regarding an alternative method, she characterized that it was equivalent to forcing the proponent. Again, that is entirely inconsistent with the case law.

What the case law in this matter says is it's the Divisional Court portion of the decision on the Eastern Ontario stated case. It's in the brief of the Ontario Public Health Association. They use the Ontario Municipal Board reference, which for some reason unknown to me calls the case re.

Ottawa-Carleton. I can't quite understand why.

But in any event, the citation that I more normally use is re. Joint Board and Ontario Hydro, which is 51 OR 2nd. And at page 74, what the Court says in dealing with is that Hydro's option under those circumstances is to accept or decline the approval that

1	is granted. There is no element of forcing us to do
2	anything and nor can this Board, with respect, force us
3	to do anything except act in accordance with your
4	decision if we want to act with respect to alternative
5	methods of carrying out the undertaking. So it can't
6	be said that the danger raised by Ms. Kleer of forcing
7	us to do something is a real danger. It just isn't.
8	Now, in terms of the jurisdictional
9	argument, whether you have lost jurisdiction, it's
10	always a powerful concern to a hearing panel. Trotting
11	off to Divisional Court always sounds very serious.
12	There are a myriad of questions that this panel deals
13	with everyday that have that potential. In this case,
14	I submit to you that the risks associated with that are
15	in relative terms small. I have told you what the plan
16	is. It's part of the environmental assessment
17	background. That's what the plan deals with.
18	You have the clear jurisdiction to amend
19	the plan, and suggestions for amendment can come from
20	all parties, including the proponent. It is within
21	your jurisdiction to consider amendments to the
22	environmental assessment. And the environmental
23	assessment document incorporates, in our submission,
24	the plan. You can't read the definition of undertaking

any other way. It clearly says it's not the plan; it

1	is only certain elements of it that are put before you
2	for approval. So that the plan is part of the
3	environmental assessment. And you clearly have under
4	12(2)(c) the jurisdiction to amend the EA, and that is
5	squarely before the Board on the words of the statute.
6	You can also take comfort that with
7	respect to approval of the undertaking, the courts have
8	considered this question of jurisdiction. What can you
9	do? In Eastern Ontario, at the Divisional Court level,
10	after a very unhappy experience on the Southwestern
11	Ontario case, a set of questions were put to the
12	Divisional Court.
13	And what did they say about this issue of
14	whether or not the actual approval of the undertaking
15	could only be in relation to the specific method of
16	carrying out the undertaking which is preferred by the
17	proponent and therefore gets plugged into the
18	undertaking. What did they say about that? What they
19	said was: We are of the power that these powers, and
20	they are referring to here 12(2)(e):
21	We are of the opinion that these
22	powers permit the Board to attach as a
23	condition to its approval of the
24	undertaking the acceptance by Hydro of
25	any one of the methods of carrying out

1	the undertaking originally identified by
2	Hydro.
3	My friend Mr. Mark might get some comfort
4	if he stopped reading there. But, again, I urge him to
5	continue reading because what it says is: "Indeed
6	it the panel, the Board:
7	It could attach as a condition of its
8	approval the adoption by Hydro of a
9	method of carrying out the undertaking
10	never previously considered by Hydro.
11	They addressed this issue squarely. They
12	said Hydro's option would then be to accept or decline
13	the approval as qualified by the Board. There is no
14	jurisdictional question here. The Divisional Court
15	ruled on that. That decision of the Divisional Court
16	was appealed. On this specific question, the Court of
17	Appeal ruled that it had been answered correctly.
18	Now the Environmental Assessment Act
19	matters, I may not be exactly right but I think I am
20	pretty close in saying that if there is any single set
21	of questions in relation to the interpretation of this
22	Act, I think this is the only one that has Court of
23	Appeal level approval. It is pretty clear. You can't
24	get any better authority about the nature of your
25	jurisdiction.

1	You can substitute for the preferred
2	method of carrying out the undertaking, which is what
3	you found at page 19-2 in the original application
4	you can substitute 19-3. You can substitute something
5	to use the words of the case "never previously
6	considered by Hydro". And even if my friend is right
7	that it has never previously been considered by Hydro,
8	it has now and the Court of Appeal says it is within
9	your jurisdiction to consider it.
10	Statutory interpretation question dealing
11	with Mr. Shepherd's distribution of the notice of the
12	hearing. Mr. Shepherd refers to the: re. line of the
13	reference, an Environmental Assessment Board from
14	Ontario Hydro for the Demand/Supply Plan.
15	That is in my submission in statutory
16	interpretation terms equivalent to the recitals of the
17	statute. When you are interpreting the statute, you
18	look to what it actually says in the sections. What it
19	actually says in the sections are the A.B.C. on the
20	notice. The A.B.C. on the notice are exactly the words
21	of the statute. In my submission there is no point of
22	statutory interpretation here that helps Mr. Shepherd
23	out on the point that he is trying to make.
24	A couple of odds and ends.

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Mr. Mark says, well, trash this hearing.

1	Ontario Hydro has these five or six other applications
2	and they can sort of deal with these issues over there.
3	It's not a big deal. The Environmental Assessment Act
4	says you have got to have your planning considerations
5	in that hearing. If we can't get them approved here,
6	we are going to do this six times in every one of those
7	applications.
8	That's the whole point in trying to have
9	one sensible comprehensive look at it. Quite frankly,
10	Ontario Hydro is not really attracted to that
11	proposition. I don't think that should be a surprise.
12	I'm not so confident then we are looking at an
13	undertaking under the Update where the approvals that
14	we are requesting are \$7 billion worth of facilities
15	that it really makes sense to say, well, we will do
16	this in each one. I'm sorry, I don't find that
17	argument persuasive and in my submission you shouldn't

I do think that the conversation with Mr. Rosenberg about well, if Hydro now said that it didn't really mean it and then called its case on the basis of well, we are only going to call a little bit of evidence about that and if we lose at the end, you know, well, I guess we will just be kind of unhappy about that. To me that shows the ridiculous, the

either.

1	ridiculous nature of t	the propositions	that are being
2	put forward to you.		

If we can circumvent all these arguments of the MEA and the CAC by simply saying, I withdraw, we will call our panels, and gee, when we are pressed in cross-examination because we are under oath, we will have to say, well, we might do it a little differently now, and here is how we do it. And that's okay if we do it that way. In my submission that is a just a ridiculous proposition. I don't think any court would ever entertain that distinction as making any common sense whatsoever.

And finally, you know, my friends have put a lot of weight on the strategy. Take you back to the five strategic elements of -- the five basic thrusts of the strategy, Exhibit 74. Demand management is top priority. Certain other things are high priority. Fossil and nuclear, lower priority than all of that.

But there was one broad strategic set of guiding principles that guided the plan that are essential to its understanding, and I submit to you that it's those. And I submit to you that the problem that MEA is having, the problem that Mr. Heintzman is having, and the problem that some of these parties are

1	having is not with the fact that it has been updated.
2	It is not with the fact of accommodating changes to
3	planning. Their big problem is they never believed we
4	meant it. They never believed we meant it. And we are
5	showing we meant it.
6	Hydro has applied those five basic
7	strategic approaches and we are saying, you know what,
8	we said it in the environmental assessment and we meant
9	it. We meant it to govern our actions and it has
10	governed our actions. We are pursuing exactly what we
11	said we would pursue. And we could pretend that it
12	doesn't make any difference, but it does. We meant it.
13	In my submission the whole problem here
14	is that the parties like MEA didn't believe we meant
15	it. And I say that's their problem. It is not our
16	problem. And it is not this Board's problem. It's
17	their problem.
18	Unless the panel has any questions for
19	me, those are my submissions.
20	THE CHAIRMAN: Did I hear you correctly a
21	moment ago that you looked at page 19-2 and said that
22	it was open to us to grant the approvals that are
23	contained on that page as an alternative to the
24	undertaking?

MR. B. CAMPBELL: When we filed this

1	application, what I said was that we had a program.
2	The program definition is not changed. When we filed
3	the application, we said this is Ontario Hydro's
4	preferred method of carrying out this undertaking.
5	That's what it is you take forward for approvals.
6	We have now changed to a different
7	preferred method of carrying out the undertaking but it
8	is not a change of a sufficient nature or kind to
9	warrant ending this hearing. It is entirely consistent
10	with the undertaking as it was previously described.
11	Others may argue that what is on 19-2
12	constitutes a method of carrying out the undertaking
13	and they are open to try and persuade you of that. We
14	say that given the circumstances we see now, it's
15	excessive.
16	THE CHAIRMAN: So either by way of
17	condition or otherwise, we could in effect grant
18	approval to proceed with Plan 15? Is that what you are
19	saying?
20	MR. B. CAMPBELL: I think as a technical,
21	pure technical jurisdictional matter, that's correct.
22	It's an alternative method of carrying out the
23	undertaking. I think as any practical sense that where
24	the proponent comes forward - and I will indulge myself

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a little bit by Mr. Rosenberg - and absolutely

1	convinces you by the end of Panel 10 that what it is
2	now proposing makes better sense in today's
3	circumstance, that you will make no such finding that
4	this method of carrying out the undertaking is.
5	appropriate. We hope to persuade you that the kind of
6	thinking that is represented in the Update is into
7	today's circumstances the appropriate method of
8	carrying out the undertaking.
9	So I view this as there is a technical
10	answer and then there is a practical answer. We are
11	not going to call evidence in support of this our
12	formerly preferred method of carrying out the
13 .	undertaking. Our evidence now, our evidence for Panel
14	.9 and our evidence in Panel 10 is going to be aimed at
15	persuading you that the Update is the preferred method
16	of carrying out the undertaking.
17	THE CHAIRMAN: So 452 is not an
18	evidentiary document; primarily it's an argumentative
19	document?
20	MR. B. CAMPBELL: I think all of these
21	conclusions are reached on the basis of opinion
22	evidence and at some level it sets out the rationale
23	for the preferred method of carrying out the
24	undertaking as it is described now in Exhibit 452.
25	MC DATTERCON. Could you point to where

- 1 the alternatives to the undertaking are described. 2 MR. B. CAMPBELL: We consider the 3 alternatives to the undertaking to be those elements of the Demand/Supply Plan -- I'm sorry, I was distracted. 4 5 I wanted to check one point before completing my 6 answer. 7 We have considered that the alternatives 8 to the undertaking are those items such as demand management which have to be taken into account in the 9 planning but do not require approvals. It's a very 10 11 difficult --12 THE CHAIRMAN: Although they are 13 components of the Plan? 14 MR. B. CAMPBELL: Absolutely. And the 15 problem you face in this characterization and we've 16 thought about this because it's kind of an interesting 17 conceptual point. (Laughter) 18 Normally when a proponent comes before 19 you, when a proponent comes before you, they say, we want to do this, we don't want to do that, and we don't 20 21 want to do this -- we sure don't want to do this other thing. And the first one is kind of what they want to 22 23 do. The second one might be an alternative method,
  - well, you can sort of -- it's reasonable to consider doing it this way.

1 [5:40 p.m.]

This thing is so different that we don't
want to have anything to do with it. Somebody may
convince you that we should, these things are always
open to argument.

But what you have got, in any kind of plan or program matters, when you are dealing with a plan that says not we are going to do this or the six items that are in the notice; we are basically saying, we are sort of thinking that over a period of this we are going to do it all.

We are doing demand management, the only equestion is how much. Well, does that make demand management a method, does it make so much a method and so much a 'to'? We are doing demand management. We are not saying it's an alternative in the sense that it is an either or; we are saying we are doing that.

NUGs, it's not an alternative in the sense of either or. We are doing that too. We are doing hydraulic. We are doing Manitoba transmission. We are doing all of these things. And the essence of the integrated planning is sort of how much should you do at any one point in time, those sorts of questions.

So it is very difficult, I think, to

1	characterize. You could even, within the same option
2	say, well, this much we can consider an alternative
3	method and that much is a 'to'.

I have never actually been able to figure out a perfectly satisfactory test that fits that broad range. It's very difficult under the statute.

In that circumstance what we did was we said, the important distinction in that, the law says the important distinction as between a method or a 'to' is what can you approve. So we have identified what we consider a method, it's the program, it's the supply things, it's those, and we are saying those things are things that we think you can approve. The rest of them we don't need approvals for.

So from the perspective of this proponent at this point in time, the only relevant distinction is, between 'to' and method is how it relates to approvals.

Everything that isn't within the methods we don't need approvals for. The Act doesn't distinguish between the kind of analysis you have got to do between alternatives to's and alternative methods, so we are doing the same kind of look at, the scope of our look at all of the alternatives is the same, so we stopped worrying about the question.

1	Nothing turns on it. In the end it's all there.
2	You can spend days and hours and weeks
3	agonizing over whether 1,000 megawatts of demand
4	management makes a method, but if you go too far then
5	it's so unreasonable that this becomes a 'to'.
6	Well, I don't know how you do that,
7	because this is a unique situation. It's the first
8	time I have ever seen anything in front of the Board
9	where the proponent was saying we are doing all of the
0	alternatives that are reasonable.
1	And so in the end we tried to focus on
2	the things that mattered, and sort of got
3	intellectually lazy and a little bit gave up when it
4	didn't matter anymore, given that we were doing all the
5	work anyway. And it may not be elegant, I don't know
6	else you deal with it where you are doing everything
7	anyway.
.8	THE CHAIRMAN: Well, you may be right or
.9	you may be wrong, but it doesn't need to be considered
0	I wouldn't be prepared to agree or disagree with you at
1	this point.
2	But it does intrigue me that demand
3	management is a component of the plan and therefore
4	part of the undertaking and yet doesn't require

approval. I have some problem with that. I am taking

1	demand management as an example.
2	MR. B. CAMPBELL: Well, Mr. Chairman,
3	this is the kind of example I think that when my
4	friends have put to you I have been careful to correct
5	them and I would only be fair to do the same with you.
6	We have said that the only things that
7	are included in the undertaking, the undertaking is a
8	program in respect of activities. The only activities
9	that it is in respect of are those things where EA Act
10	approval is required. Demand management, EA Act
11	approval is not required and so it is not in the
12	.program, it is not part of the
13	THE CHAIRMAN: That's just your
14	submission, I take it. It's your submission it's not
15	required.
16	MR. B. CAMPBELL: No. In my submission,
17	Mr. Chairman, this goes to the very essence of where I
18	started. The courts have said we can define the
19	undertaking. We have done it. That's what is in,
20	that's what is out.
21	THE CHAIRMAN: I am not going to go
22	through 19(1) again, but it seems to me that demand
23	management is in part of the undertaking and then you
24	say we are not asking for those things, we don't

require approval and it's a matter of opinion as to

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1	what things do or do not require approval.
2	MS. PATTERSON: In any event, you are
3	relying on them. You are relying on some demand
4	management and some NUGs, et cetera, so
5	MR. B. CAMPBELL: Absolutely.
6	MS. PATTERSON: So how is that an
7	alternative to?
8	MR. B. CAMPBELL: What we say is it's not
9	part of the undertaking being a program of activities
10	for which approval is required, which is the way we
11	have defined the undertaking, because you can't stop
12	reading the way Mr. Mark does. You have got to keep
13	reading.
14	THE CHAIRMAN: You can define the
15	undertaking but we decide what the approvals are
16	required; isn't that right?
17	MR. B. CAMPBELL: Exactly. And that is a
18	big difference in those two jobs. You got it exactly
19	right.
20	THE CHAIRMAN: I join Mr. Mattson, I
21	guess, in that category. [Laughter]
22	MR. B. CAMPBELL: Well, apart from one
23	point that I won't bother getting into which revolved
24	around these alternatives to and methods, Mr. Mattson's
25	description of the flow of the Act was as good as you

1 are going to get. He had it exactly right. 2 Don't be ashamed of being in his company. It's good company. [Laughter] 3 THE CHAIRMAN: Thank you, Mr. Campbell, 4 5 Mr. Mark, I sort of thought you might 6 stand up. 7 MR. MARK: I think I am going to please 8 you, Mr. Chairman. Despite the fact I think there has been a great big sandwich created here, I had a number 9 of points, there is just one I wanted to make on the 10 11 only issue which really is new raised by Mr. Campbell, if you give me one minute, we won't have to come back 12 13 to hear anything else I have to say. 14 THE CHAIRMAN: Yes, go ahead. 15 FURTHER REPLY BY MR. MARK: 16 The only really new issue, Mr. Chairman, 17 is the one on the question - and I think it's a fundamental one - is whether Plan 15 is still on the 18 table to be approved by you as an alternative method of 19 20 carrying out the undertaking. 21 Mr. Campbell suggests that technically it is, and I think he is really trying to sit on that 22 23 fence that Hydro has got going here of saying, well, I

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have got to say that to sustain my argument that these

plans are really just alternative methods. But he goes

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1,	on I think quite correctly to say, let's look at it and
2	in practical terms. It's not going to happen. He says
3	Ontario Hydro views the old plan as being so
4	fundamentally different from what it considers
5	MR. B. CAMPBELL: I'm sorry, Mr. Chairman
6	that is not what I said.
7	MR. MARK: Mr. Campbell, as I understood
8	him, said that it is of such a nature that let's be
9	practical about it, it is not going to come to pass.
10	If Ontario Hydro is here with its
11	evidence saying that it is not going to it is just
12	beyond the realm of reasonable possibility that this
13	panel is going to say that that is the preferable
14	alternative, then I suggest, Mr. Chairman, that your
15	view of what is or is not an alternative method should
16	follow that reality. And say, if Mr. Campbell is here
17	arguing it is not going to happen unless, you know,
18	some great event befalls us we don't know about it,
19	then I think the result of that, respectfully, is that
20	it is not an alternative method of carrying out the
21	undertaking.
22	It goes back to something that Mr.
23	Mattson said in one of the more peculiar submissions I
24	have heard today, and really quite an odious one
25	really, he says, Mr. Mattson says, what has the MEA got

1	to complain about. He says in his view Plan 15 is no
2	longer on the table. You can't approve it, he says.
3	But of the MEA shouldn't complain because they can come
4	and argue Plan 15, come and argue Plan 15 until the
5	cows come home but no, this Board can't order it.
6	That's the submission of the day and I
7	think it resolves around the same submission that Mr.
8	Campbell is making, you have got to decide here, either
9	it's within the realm of practical, reasonable
10	possibility or it's not.
11	Thank you, Mr. Chairman.
12	MR. B. CAMPBELL: Mr. Chairman, what I
13	said, and I think I did not say that it was different,
14	so different in nature. What I said was our Panel 10
15	evidence will persuade you that it is better. That's
16	why you need to stay and hear the evidence before you
17	can even contemplate deciding on this question. I
18	didn't say what Mr. Mark said.
19	THE CHAIRMAN: Well, the transcript will
20	disclose what people said.
21	I would like to, if I may, just express
22	my gratitude to the parties here for the time and
23	effort they have put in not only preparing for today
24	but participating in it. Speaking for myself, I have

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absolutely no idea how this will eventually turn out

1	because it's quite a bit to digest over two days, but
2	we will try, as I said yesterday, to get the decision
3	out as quickly as we can.
4	We are also aware that next week is the
5	mid-winter break and therefore we are not going to be
6	working on this next week either, so that it may be
7	that we will not have this decision out by the 24th of
8	March, Tuesday the 24th of March, when we reconvene
9	again. We will try to, but I am not going to promise
0	it, and I think there is a possibility that we won't be
1	able to.
2	I think, notwithstanding that, that the
3	parties ought to proceed on the basis that Panel 9 will
4	proceed on the 24th. I do that on the same basis that
5	we decided back in January the 27th that it was
6	appropriate to proceed with the fossil panel. I think
7	that we should keep that schedule in mind and we should
8	be ready to go on the 24th with the Panel 9 evidence.
9	There is, of course, the possibility that
0	that may be unnecessary, as was evidence through from
1	Panels 1 to 8, but we will just have to take that risk,
2	I guess.
13	So, we will now adjourn until ten o'clock
1	on the 24th of March.

25

THE REGISTRAR: This hearing will adjourn

1	until the 24th of March at 10:00 a.m.	
2	Whereupon the hearing was adjourned at 5:50 p.m. to be resumed on Tuesday, March 24, 1992, at 10:00 a.m.	
3	24, 1332, at 10:00 a.m.	
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